FILED OCT

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1

Docket Entry Sheet

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,

Appellees.

THE STATE OF NEW YORK,

Appellant,

vs.

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,

Appellees.

Motion for Admission of Additional Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

TRANSIT COMMISSION,
Appellant,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,
Appellees.

THE STATE OF NEW YORK,
Appellant,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, and the INTERSTATE COMMERCE COMMISSION,
Appellees.

No. 535

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal from a decree of the United States District Court for the Southern District of New York, made in a consolidated cause, which denied motions for a preliminary injunction and dismissed with costs petitions to enjoin and set aside a certificate (R. 547) of the Interstate Com-

merce Commission, which certified that the present and future public convenience and necessity required the continued operation by The Long Island Railroad Company, over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company, between Harold Avenue in Sunnyside Yard and the Pennsylvania Station, New York, N. Y., upon the express condition that the existing terms and conditions as to rental be modified in the respects and to the extent indicated in said certificate.

The suits were brought under the Act of Congress approved October 22, 1913 (28 U. S. Code, Secs. 41(28) and 43-48).

The decree of the District Court was signed October 19, 1932, and entered October 20, 1932 (R. 580-581).

Petition for appeal was presented on November 7, 1932, and was allowed on the same day (R. 583).

Jurisdiction of this Court rests on the Act of Congress, October 22, 1913, Chap. 32, 38 Stat. 208, 220 (28 U. S. Code, Sec. 47), as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 938 (28 U. S. Code, Sec. 345).

The only issue raised in this case is one of law, namely, whether the Interstate Commerce Commission had authority to issue this certificate.

Specifically, the questions of law presented are:

1. Whether Section 1(18) of the Interstate Commerce Act applies to operation under trackage rights at all;

2. If so, whether it is retroactive and applies to such operation begun prior to the enactment; and

3. If so, whether the Commission can pass upon and dictate the terms and conditions of the agreement, to the exclusion of the State authorities.

Statement.

Ever since the completion of the Pennsylvania Station in 1910, the Long Island Railroad Company has been operating its trains into it, under a trackage agreement. The Pennsylvania Station and yard, located in midtown Manhattan, is the eastern terminal of the Pennsylvania system. In addition to this station building and yard, the terminal property consists of two single track tunnels which run in a westerly direction under the city and the Hudson River into New Jersey, and four single track tunnels which run in an easterly direction under the city and the East River, and of the Sunnyside Yard in Queens (Finding of Fact 1, R. 573).

The legal ownership of this terminal property is in the Pennsylvania Tunnel and Terminal Railroad Company; but the Pennsylvania Railroad Company owns all the stock in the Terminal Company, as well as practically all the stock of the Long Island Railroad Company (Finding of Fact 2, R. 573).

Upon the completion of the Pennsylvania Station in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought and obtained the necessary permission and approval of the Public Service Commission for the First District of the State of New York, thus extending its operation from Long Island into midtown Manhattan. This agreement, with like approval, was modified by another dated June 24, 1912; and the rental payable by the Long Island was, in 1920, and again in 1922, increased with the approval of the Public Service Commission and (after 1921) of its successor, the Transit Commission. Under these various changes approved by the State authorities, the rental payable by the Long Island increased from $519,173 in 1911, to $1,660,165 in 1922, and to $1,812,024 in 1923 (Finding of Fact 3, R. 573-574).

In 1923 the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further increase

of the rental payable by the Long Island. The Long Island contemporaneously sought to increase its intrastate commutation fares for passengers (Finding of Fact 4, R. 574).

Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share, on a wheelage basis, in the interest at 4 per cent. on the investment in the jointly used facilities and in the station building, instead of paying the lump sum of $300,000 as before. Under this proposed agreement, the Long Island would share in the interest (as well as in the operating expenses and taxes) on a wheelage basis—that is, according to the percentage which the cars operated by it in each of the three zones, into which the joint facilities were divided, bore to the total number of cars operated therein by the Pennsylvania, the Long Island, and the three other carriers to which the Pennsylvania had granted trackage rights. This change would have increased the Long Island rental by over $1,000,000. This amendment was disapproved by the Transit Commission (Finding of Fact 5, R. 574).

For the purpose of counting cars, there are three zones: the first consisting of the Pennsylvania Station and the station yards between Sixth and Tenth Avenues, Manhattan; the second, consisting of the tracks, extends east from Sixth Avenue through the East River tunnels and to Harold Avenue in Queens; the third, consisting of the Sunnyside Yards, lies to the north and a little to the east of the most eastward portion of the second zone (Finding of Fact 6, R. 574).

Most of the Pennsylvania trains which carry "commuters" stop in New Jersey, where the passengers are transferred to the tubes of the Hudson Terminal, whereby they come into the city. The Pennsylvania trains from a long distance come through the Hudson River tunnels to the station in Manhattan, there unload and thence continue through the East River tunnels to the Sunnyside Yards, where they are

stored, cleaned and repaired and again made up into trains which return under the East River to the station in order to load and proceed westward (Finding of Fact 7, R. 575).

The Long Island trains come from the east over the Pennsylvania tracks, under the East River into the Pennsylvania Station, load again and start back east. Since a majority of the passengers are "commuters," a number of these trains remain in the Pennsylvania Station during the middle of the day and at the eastern Long Island terminals during the night (Finding of Fact 8, R. 575).

The Sunnyside Yards are used for storage principally by the Pennsylvania, while the Manhattan yards are used principally by the Long Island. As the station yards will not hold all the Long Island cars, some are returned to points on Long Island, though the percentage thus returned is small. A few trains are stored at Jamaica. The relative percentages of car movements for 1928 in the three zones was as follows:

	Long Island	*Pennsylvania*
Zone 1.....	41.44%	58.56%
Zone 2.....	59.94%	40.06%
Zone 3.....	11.60%	88.40%

(Finding of Fact 9, R. 575).

The wheelage ratios, representing the proportion which the Long Island was required to pay in 1930 on the investment in each of the three zones was as follows:

Zone 1.....	42.08%	$46,896,745.94
Zone 2.....	60.49%	32,605,521.38
Zone 3.....	7.65%	8,625,170.90

(Finding of Fact 10, R. 575).

In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000, representing the cost of the station building above the track level, and increased the share in the interest from 4 to 5 per cent.

This proposed agreement was disapproved by the Transit Commission in May, 1925, but on July 28, 1925, was approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase in the interest rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926 (Finding of Fact 11, R. 575-576).

The rental payable by the Long Island under the trackage agreement approved by the Transit Commission increased from $1,812,024 in 1923 to $2,835,151 in 1928 (Finding of Fact 15, R. 576).

In 1929, the carriers applied to the Interstate Commerce Commission for a certificate, under Section 1(18) of the Interstate Commerce Act, that public convenience and necessity required a continuance of operation, and for an order, under Section 3(4), requiring the use of joint facilities at the rental and upon the terms embodied in an agreement dated November 13, 1928. The Interstate Commerce Commission held that Section 3(4) was not applicable to a case where one carrier agreed to the use of its facilities by another. It held that it did have jurisdiction under Section 1(18), but denied the application without prejudice on the ground that it imposed unreasonable terms upon the Long Island (Finding of Fact 12, R. 576; Report of Division 4, R. 335).

In its report, *Long Island Railroad Company Trackage*, 162 I. C. C. 218, the Commission said (R. 336):

> "It is true that the joint agreement under which the Long Island has been using these facilities since July 1, 1923, is one which was framed to meet the requirements of the Transit Commission, as expressed and made retroactive by their approval of the contract of July 28, 1925, after extended hearings and investigation. Prior agreements were also approved by the Transit Commission or its predecessor. It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily con-

cerns intrastate passenger traffic, indeed hardly more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local. These facts do not, however, place the granting of authority covering these trackage rights beyond the purview of section 1(18). The existing agreement of the Pennsylvania and the Long Island was on a yearly basis. It technically expired on December 31, 1925, and was extended for one year. The desire now being to establish a more permanent arrangement, the proposed agreement is for a term of 20 years beginning July 1, 1928. The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous";

and (R. 337):

"The reasonableness of a joint-facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied";

and (R. 338):

"The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary. The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonableness and should not be influenced by the contingency emphasized by

the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter. The terms of past agreements are not before us for approval."

Under this proposed agreement of November 13, 1928, the station building was reinstated in the investment. The items of operating and maintenance expenses previously withdrawn as pertaining to the station above the track level were also included. The interest rate was increased from 4 per cent. to 6 per cent. on the investment. Allowance was made for rentals received by the Pennsylvania from offices, stores and other concessions in the station. As under the then existing contract, the aggregate of interest, taxes and operating expenses in each zone was to be the base to which the wheelage measure in that zone applied. There would be no change in the direct operating charges. The agreement contained provision for revision at the end of five-year periods with respect to the rates of interest and the bases upon which they were to be computed (Report of Division 4, R. 344).

On December 27, 1930, the carriers made another application to the Interstate Commerce Commission under Section 1(18). This application eliminated from the investment base $15,000,000, representing the station building above the track level, required the Long Island to pay 20 per cent. of the operating expenses of that building, and reduced the rate of interest from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted a certificate of public convenience and necessity, upon condition that the rental upon additions and betterments, made to the Pennsylvania Station after July 1, 1928, should be excluded from the rate base, that the term of the agreement should be five years instead of twenty years, as applied for, and that the rate of interest on the investment cost of jointly used facilities should be 5 per cent. (Finding of Fact 13 (R. 576).

This 5 per cent. rate is higher than that paid by the Pennsylvania to its lessor, namely, 5 per cent. on $50,000,000 capital stock of the Tunnel Company and 4.5 per cent. on $58,600,577 principal amount of its bonds, or about 4.7 per cent. (R. 355).*

* *Acquisition by P. R. R.*, 154 I. C. C. 283.

On February 26, 1932, the Transit Commission made application to the Interstate Commerce Commission for a reargument or rehearing (R. 548-550); and on March 14, 1932, the Interstate Commerce Commission entered an order denying said application (R. 563).

The certificate or order of February 8, 1932, had provided in part (R. 547):

> "It is ordered, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance; and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed."

The companies filed with the Interstate Commerce Commission their acceptance of the order or certificate, dated March 2, 1932, and a copy of a new trackage agreement, dated March 10, 1932 (Finding of Fact 14, R. 576).

On March 31, 1932, the Transit Commission instituted suit to enjoin, set aside and annul the order or certificate of the Interstate Commerce Commission (R. 1-10). An identical suit was instituted by the State of New York on April 15, 1932 (R. 53).

Answers to the petitions of the Transit Commission and of the State of New York were filed as follows: by the Interstate Commerce Commission on April 22, 1932 (R. 10, 54); by the Pennsylvania and the Long Island on April 29, 1932 (R. 47, 59), and by the United States on May 3rd and 5th, 1932 (R. 51, 63).

On June 8, 1932, orders were signed requiring the respondents to show cause on June 28, 1932, before a court composed of three judges, why an interlocutory injunction should

not issue, suspending and restraining the enforcement, operation and execution of, and setting aside the certificate of February 8, 1932 (R. 65, 66).

These orders came on for hearing on June 29, 1932. The cases were consolidated; and the record before the Interstate Commerce Commission was introduced in evidence (R. 67, 564).

On October 3, 1932, an opinion denying the motions for a preliminary injunction and dismissing the petitions with costs was handed down (R. 564).

Findings were filed October 14, 1932 (R. 572).

The final decree was entered October 20, 1932 (R. 580).

The order allowing appeal was signed November 7, 1932 (R. 584).

Specification of Assignment of Errors to Be Urged.

The District Court erred:

1. In failing to enjoin, set aside, annul or suspend the order and certificate of the Interstate Commerce Commission dated February 8, 1932.

2. In dismissing the petitions of the petitioners and denying their applications for an injunction.

3. In holding that the issuance of said order and certificate was within the authority conferred upon the Interstate Commerce Commission by Section 1(18) of the Interstate Commerce Act.

4. In holding that Section 1(18) of the Interstate Commerce Act has application to operation conducted under trackage rights by one carrier over the existing tracks of another interstate carrier.

5. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad Company, when running its trains under the

proposed trackage agreement, would be operating "a line of railroad" within the meaning of Section 1(18) of the Interstate Commerce Act.

6. In holding that jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island Railroad Company, when running its trains under the proposed trackage agreement, would be undertaking the "extension of its line" and engaging "in transportation * * * by means of such extended line."

7. In holding that Section 1(18) of the Interstate Commerce Act applies to operation begun prior to its enactment.

8. In holding that the Interstate Commerce Commission has jurisdiction over the trackage agreement under Section 1(18) of the Interstate Commerce Act.

9. In holding that, under Section 1(18) of the Interstate Commerce Act, the Interstate Commerce Commission has jurisdiction to prevent the abandonment of trackage rights, the power to compel continuance thereof, and, as incidental thereto, the power to determine what sort of an agreement is compatible with the interests of interstate commerce.

10. In holding that Section 148 of the Railroad Law of the State of New York no longer governs this case.

11. In finding as a fact that operation under trackage agreements over existing lines of another carrier may substantially affect interstate commerce, by affecting the ability of the carriers involved to perform their services as a part of the general transportation system of the country, by unnecessarily duplicating lines or by causing undesirable expense or other burdens.

12. In finding as a fact that an extension arising out of a trackage agreement has a vital effect on interstate commerce and requires national control, and that the same

dangers that are to be guarded against when a railroad extends its line for its own use or leases it for the sole use of another exists where it agrees to a joint use by itself and another road.

Summary of Argument.

The Interstate Commerce Commission assumed jurisdiction over this case on the theory that the Long Island could not, without a certificate, legally continue to use the Pennsylvania tracks under trackage rights as it had done since 1910. The Commission sought to supplant the terms and conditions under which the parties were then operating by making its certificate effective only upon the promise by the carriers to file a new agreement containing different terms and conditions.

Authority for such action is claimed solely under Section 1(18) of the Interstate Commerce Act, under which a carrier must obtain a certificate before it

> (1) "shall undertake the extension of its line of railroad";
>
> (2) shall undertake "the construction of a new line of railroad";
>
> (3) "shall acquire or operate any line of railroad, or extension thereof";
>
> (4) "shall engage in transportation under this chapter over or by means of such additional or extended line of railroad," or
>
> (5) "shall abandon all or any portion of a line of railroad, or the operation thereof."

Section 1(18) is limited to the extension, construction, acquisition or abandonment of lines of railroad, undertaken subsequently to the Act of 1920, and to the use of lines so constructed or acquired. The purpose of Congress was to guard against the construction or acquisition of unnecessary

or competing lines—to give the Interstate Commerce Commission control over acts or things involving capital expenditures and increasing the valuation on which rates must be based and the amount of outstanding securities. Congress acted on the belief that existing interstate facilities ought not to be expanded, except under the supervision and control of the Interstate Commerce Commission, but that the more intensive use of such existing facilities required no such control. It covered construction and acquisition by Section 1(18), but it covered the joint use of terminals by Section 3(4), and there only in so far as compulsion was necessary in order to secure such use (Point I).

This construction is confirmed by the statements made in Congress by those who had drawn and were sponsoring the bill (Point II). It was the construction followed by the Interstate Commerce Commission when it dismissed applications for approval of trackage rights for lack of jurisdiction (Point III) and when it made its recommendations which resulted in the Transportation Act of 1920 (*post*, p. 53).

The Court below erred in holding that the Long Island in operating *over* the Pennsylvania tracks was *operating a line of railroad* within the meaning of Section 1(18). The verb "operate" is used transitively, with "line of railroad" for its direct object, and means to manage and control a line of railroad, and not merely to operate over it (*post*, p. 24). The Court below rejected this because "that would prevent national control." Congress, and not the Interstate Commerce Commission, is the body which determines the extent to which national control shall be exercised; and, in this instance, did not extend its direct control to the use of existing tracks, under trackage rights (Point VI).

The Court below erred in holding that the Long Island in extending its *operation* over the Pennsylvania tracks was extending its *line of railroad*. It based its conclusion on a finding of fact unsupported by evidence and insufficient, if proved, to support the conclusion, and on certain assumed decisions and *dicta*, the effect of which was misunderstood by the Court below (Point VII).

The Court below erred in holding that jurisdiction was properly assumed by the Commission, "because the Long Island, when running its trains under the proposed trackage agreement * * * would be preventing an abandonment." The word "abandonment," as used in Section 1(18), refers to the surrender of the carrier's franchises and property, and not to the mere discontinuance of operation. Congress could prevent a carrier from *abandoning* its line, but, for constitutional reasons, could not require one carrier to submit its road to use by another after the contractual right to do so had expired. The words "extension," "construction," "acquisition" and "abandonment" all refer to lines of railroad owned by a carrier, and not to the use by one carrier of a line owned and controlled by another (Point VIII).

Section 1(18) was not retroactive; and, even if it were assumed that it applied to operation or use, does not apply to operation or use begun ten years before the Act became effective and continued without interruption ever since (Point IV).

Even if it were assumed that Section 1(18) applied to use in general and to this use in particular, the Interstate Commerce Commission, after finding facts which warranted the issuance of a certificate, had no right to withhold that certificate until the carriers should file a new agreement superseding the terms and conditions authorized by the State authorities, under which the carriers were then operating (Point V).

This case involved merely a question of statutory construction; and it was improper to resort to judicial legislation in order to give effect to the policy which, in the opinion of the Court, ought to have been followed by Congress (Point IX).

POINT I.

Section 1(18) of the Interstate Commerce Act confers jurisdiction over the making, by an interstate carrier, of additions to its own line, through construction or acquisition, and over the operation of lines so added, but not over the mere use by such carrier jointly with the owner, of existing lines of another interstate carrier.

Since 1910 the Long Island has been using jointly with the Pennsylvania certain tracks controlled by the latter. The rental paid by the Long Island for such use was that approved by the State authorities. The carriers sought to increase this rental. Having failed to secure from the Transit Commission the full amount sought, they applied to the Interstate Commerce Commission (1) for a certificate, under Section 1(18), that public convenience and necessity permitted continuance of this use, and (2) for an order, under Section 3(4), requiring such use upon the compensation agreed upon by the parties. This compensation represented the maximum which they had sought from the Transit Commission. The Interstate Commerce Commission held that it had no jurisdiction over the application, made under Section 3(4), and dismissed that part. It assumed jurisdiction, however, under Section 1(18).

Although finding that the existing arrangement was beneficial to both parties and to the public, the Commission withheld its certificate. The proposed agreement which the carriers sought to have approved under Section 3(4) was considered under Section 1(18) and was found to be unreasonable to the Long Island (the conclusion reached by the Transit Commission in 1925); and the application under Section 1(18) was denied without prejudice. Later the carriers presented another agreement, to which the Interstate Commerce Commission also found objection. What threatened to be an annoying series of such applications was brought to an end when the Commission advised the carriers of the rental terms which would meet its approval. It there-

upon issued its certificate so conditioned as to become effective upon the promise by the carriers to file an agreement which should substitute the terms which it approved for those under which the carriers were then operating.

The validity of this condition depends upon the validity of the certificate, authority for which is claimed to be found solely under Section 1(18) of the Interstate Commerce Act, as added by the Transportation Act of 1920:

> "§1, par. (18). *Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

In *Texas etc. R. R.* v. *Northside Ry.*, 276 U. S. 475, 479, this Court said:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

See also *Texas & Pac. Ry.* v. *Gulf etc. Ry.*, 270 U. S. 266, 277-278.

In *Chesapeake & Ohio Ry.* v. *United States,* 283 U. S. 35, 42, it was said, speaking of paragraphs 18 and 20:

> "Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service."

In *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.,* U. S. , decided January 9, 1933, it was said:

> "The purpose of Congress in enacting paragraph 18, as repeatedly explained by this Court, was that though a carrier should desire to extend existing facilities or to construct new ones in territory not previously served, the free exercise of discretion should not be permitted, but the Commission must be convinced that the proposed venture would not drain the railroad's resources and disable it from performing those duties of public service under which it then rested, with consequent detriment to the public in the matter of service and rates."

The intent of Congress was to guard against the unnecessary building or acquisition of new or additional lines, the construction or operation of which might strain the resources of the owner or weaken its competitors. The purpose of Section 1(18) was to prevent the addition to the interstate system of lines which might be superfluous or competing. The statements of those who sponsored the bill clearly shows that the purpose was confined to that (Point II). That the paragraph did not confer jurisdiction over the use of existing interstate facilities, under trackage rights, was recognized by the Interstate Commerce Commission in its rulings dismissing applications for such certificates for lack of jurisdiction (Point III). It also appears from the interpretation and construction of the Act itself.

Under Section 1(18) a carrier must obtain a certificate before it (1) "shall undertake the extension of its line of railroad," (2) shall undertake "the construction of a new

line of railroad," (3) "shall acquire or operate any line of railroad," (4) "shall engage in transportation under this chapter *over or by means of such additional or extended line of railroad,*" or (5) "shall abandon all or any portion of a line of railroad, or the operation thereof."

Certain of these provisions cannot possibly apply to the joint use of existing tracks under trackage rights. Such use cannot be deemed the construction or the acquisition or the abandonment of a line of railroad. These provisions, therefore, may be at once excluded from consideration.

In using the Pennsylvania tracks the Long Island is engaging in transportation. The paragraph, however, does not apply to *all* transportation, but only to transportation "over or by means of such additional or extended line of railroad." The question, therefore, is whether the Long Island, in its use of the Pennsylvania tracks, is engaging in transportation over an "additional or extended line of railroad" within the meaning of Section 1(18). The answer to this depends, in turn, upon whether the Long Island, in beginning its use, was undertaking "the extension of its line of railroad."

The paragraph also requires a certificate before a carrier "shall acquire or operate any line of railroad." It is claimed that the Long Island, in using the Pennsylvania tracks, is operating a line of railroad. The answer to this depends upon whether "operate" means to control and manage a line or includes the mere use of a line controlled by another.

The inquiry then is narrowed down to those provisions of the paragraph which deal with (A) the "extension" of a line of railroad and (B) the "operation" of a line of railroad. These will be considered separately and in turn.

A.

Section 1(18) provides that, without a certificate, no carrier "shall undertake the extension of its line of railroad, * * * or shall engage in transportation over or by means of such * * * extended line," thus distinguishing between *undertaking* the extension of a line and *engaging in transportation over* such extended line. The idea naturally con-

veyed by this is, not of an existing line, but of a line that must first be created before the carrier *can* engage in transportation over it. In the case of an existing line, the only distinction between *undertaking* and *engaging* would be one between initial and continued use, for a carrier would be engaging in transportation the very moment it undertook the use. In the case, however, of a line that had to be constructed before it could be used, the distinction is substantial. The interpretation of the language actually employed, without need of resort to construction, seems, therefore, to indicate that Congress, by Section 1(18), was guarding against the addition of new facilities and not against the increased use of existing facilities.

This is shown in another way. The explanations given in Congress by those who prepared the bill show that Section 1(18) was not new law but was patterned upon the laws of the State of New York and other states (*post*, p. 31). In the State of New York, the purpose of the Legislature in requiring a certificate was to restrain the construction of useless roads (*N. Y. C. & H. R. R. R. Co.* v. *B. & W. El. R. Co.*, 96 N. Y. App. Div. 471, 474 [1904]; *New York Central & H. R. R. R. Co.* v. *Auburn Interurban Electric R. R. Co.*, 178 N. Y. 75). It is a familiar canon of interpretation that the provisions of a State statute, borrowed by Congress, must be construed as they were understood at the time in the State (*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36).

Paragraph 18 deals with extension, construction and acquisition. The word "extension" can, and naturally does, convey substantially the same idea as "construction." The only difference is that "construction" means the building of a new line, while "extension" means the building of a prolongation to an existing line. Under the rule of *ejusdem generis*, the word "extension" should be construed as applying to the building of additional, and not to the use of existing, trackage. The application of the word "extension" should be confined to acts or things belonging to the same general class as those meant by the words associated with it, i. e., "construct" and "acquire" (*B. & O. R. R.* v. *United*

States, 277 U. S. 291, 300). This is particularly true where the paragraph separately deals with the use, limiting it, however, to use over "such additional or extended line of railroad."

A resort to other portions of the Transportation Act merely confirms the interpretation placed on the words "undertake the extension of its line" and their construction in the light of other provisions in the same paragraph.

For example, Section 1(22) provides:

> "§1, par. (22). *Construction, etc., of spurs, switches, etc., within State.* The authority of the commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the *construction or abandonment* [these italics ours] of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Again, Section 1(19) requires that, upon receipt of any application for such certificate, notice shall be given to "the governor of each State in which such additional or extended line of railroad is to be constructed or operated." "Constructed" refers to new lines built, and "operated" to old lines acquired. The giving of notice to the governor of each State indicates that the subject matter was of more importance than mere trackage rights, which, as a matter of common knowledge, are numerous and generally of slight extent and importance.

More important is the light thrown by the provisions of Section 1(21), which provides:

> "§1, par. (21). *Power of commission to require adequate facilities or extension of line; penalty.* The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such pro-

> ceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and *to extend its line or lines:* [these italics ours] *Provided,* That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

It is reasonable to assume that the words "extension of its line," in paragraph 18, and the words "extend its line," in paragraph 21, deal with the same thing, but from different lines of approach. Paragraph 18 is permissive, while paragraph 21 is compulsory (*Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* U. S. , decided January 9, 1933). It is safe to say that, under paragraph 18, a carrier desirous of extending its lines may be *permitted* by the Commission to do so, while a carrier unwilling to extend its lines may be *compelled* by the Commission to do so. Paragraph 21 clearly purports to give the Commission power to compel the making of an extension.

If this be interpreted as a power to compel the making of extensions, by building or buying, there is no inconsistency with other provisions of the Interstate Commerce Act. If, however, it is to be interpreted as a power to compel one carrier to extend its operation over the existing lines of another, there will be a patent inconsistency between the provisions of paragraph 21 and those of Section 3(4), where the Commission is expressly given power to compel an owner of terminal facilities to grant their use to another carrier.

Section 3(4) provides:

> "§3, par. (4). *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be."

It is hardly credible that Congress, having comprehensively covered the compulsory use of terminals in Section 3(4), would deal with the very same thing in Section 1(21). The rational inference is that Section 1(21) did not deal with the same thing—use, but with a different thing—construction.

Moreover, it will be observed that Section 3(4) carefully provides for the compensation for such use. It is to be such "as the carriers affected may agree upon," or, upon their failure to agree, such as the Commission may fix upon "the principle controlling compensation in condemnation cases." This was required because such compulsory use involves a

taking of the owner's property. Section 1(21), however, makes no provision for fixing compensation. If construed as applying to use, it would similarly involve the taking of the owner's property, and would, therefore, be of doubtful constitutionality. In such case, there would have to be placed upon it the construction which would avoid that doubt (*Missouri Pac. R. R.* v. *Boone,* 270 U. S. 466, 471-472). This doubt would be avoided if the provision were construed as applying only to construction. Section 1(21) then would have to be construed as applying to construction and not to use.

It is apparent that paragraphs 18 and 21 apply to the same thing, so far as they deal with extensions. It follows that, since paragraph 21 does not apply to trackage rights, paragraph 18 does not apply either. Paragraph 18, like paragraph 21, applies only to extensions made by constructing them.

B.

Section 1(18) provides that, without a certificate, no carrier "shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such * * * additional line of railroad."

No claim is, or can be, made that the Long Island, by using the Pennsylvania tracks, has acquired a line of railroad; but, by ignoring the word "acquire" and the expression "engage in transportation" and treating the word "operate" as if it stood alone, it is argued that the Long Island is *operating* a line of railroad, because it is operating *over* a line of railroad.

If the expressions "operate" and "engage in transportation" were identical in meaning, as the above argument assumes, then the word "operate" would be superfluous. As this cannot be presumed, the conclusion must be that "operate" means something different from "engage in transportation."

It is clear that the verb "operate" is used transitively, with "line of railroad" for its direct object, while "engage in transportation" is used intransitively. As a transitive verb, "operate" refers to the complete control and management of a line of railroad, not to the mere use of a line controlled and managed by another carrier (*Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441, 450; *Troy & Boston R. R. Co.* v. *Boston, Hoosac Tunnel & Western Ry. Co.*, 86 N. Y. 107, 117, 119).

Operating a line is not the same as operating over a line. The Long Island is operating over a line, but not operating a line. Its use, therefore, does not come within the meaning of the word "operate," but within the meaning of the expression "engage in transportation," which, however, does not extend to *any* line but is limited to "such additional or extended line," i.e., a line constructed or acquired by it after the passage of the Transportation Act.

The reason for following the word "acquire" with the words "or operate" is perfectly clear. It was not for the purpose of covering the use of a line, for this is completely covered by the words "engage in transportation." Paragraph 18 is the only provision of the Act which deals with permission to construct, extend or abandon, but it is not the only provision which deals with permission to acquire. Acquisition is covered by Section 5(2); and as this section contemplates control acquired by various means, some of which do not involve the acquisition of title, it was fitting, in referring to the same matter in Section 1(18), to use the words "acquire *or operate*."

> "§5, par. (2). *Acquisition of control of one carrier by another.* Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the commission shall have authority by order to

> approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the commission to be just and reasonable in the premises."

Similarly, it would seem that the word "operation" is used in the sense of management and control, in that part of the paragraph which speaks of "construction, or operation, or construction and operation of such additional or extended line of railroad." This, however, need not be determined, since these words constitute an enumeration, not of the instances where a certificate is required, but of the things which the Commission must find in order to grant a certificate in the cases where it is required. A certificate was not required here, since the Long Island was not proposing to "operate" within the meaning of that word as used in Section 1(18).

C.

After clear rulings that it had no authority to issue certificates and after issuing certificates in non-contested cases for reasons of convenience (Point III), the Commission for the first time, in the face of active opposition, held that there was "no sound reason preventing the assumption of jurisdiction" under paragraph 18 (R. 337). Its reasons for such assumption were not derived from the construction or history of the paragraph or from any judicial utterance, but were simply based upon the ground that (*Long Island R. R. Co. Trackage*, 162 I. C. C. 218, 221):

> "The power conferred upon us by the act is in the interest of protecting interstate commerce. The carriers here involved being engaged in interstate commerce, our jurisdiction is plenary" (R. 338).

The theory that the Commission has plenary jurisdiction over interstate carriers flies in the face of the statute and of the rules of construction. Had Congress intended to give plenary power to the Commission, it would have said so in a few words, and so saved itself from the task of framing

the meticulously detailed provisions dealing with the different features of interstate commerce, over which it intended to confer jurisdiction. Being a body created by Congress, the Commission has only such powers as Congress chose to give it. The intention of Congress is the law, and this is to be derived from the plain meaning of its language or, if this is susceptible of doubt, by its construction in the light of the purpose of Congress, as shown by the context of the Act and the circumstances surrounding its enactment.

> *Ozawa* v. *United States*, 260 U. S. 178, 194.
> *United States* v. *Stone & Downer Co.*, 274 U. S. 225, 239.

This theory of "plenary powers" was not urged before the Court below. Present appellees there tried to show that use under trackage rights was equivalent to an extension or to operation, urging that these should be construed in the light of the assumption that it was the purpose of Congress to include such use. Great reliance was placed upon *Alabama Ry.* v. *Jackson Ry.*, 271 U. S. 244, which dealt, not with trackage rights, but with the making of a junction or physical connection between two interstate railroads. It was urged that, as this Court had found that the Commission had jurisdiction over such matter although not expressly mentioned in the Act, so it should hold that trackage rights also come within it. The following excerpts from the opinion were pointed out as *dicta* to the effect that the joint use of tracks did come within the Act (271 U. S. 244, 248):

> "Prominent among the enlarged powers of the federal Commission is the control conferred over construction and equipment of railroads, over their use by other carriers and, generally, over the relation of carriers to one another. While none of the amendments in specific terms confers upon the Commission exclusive power over physical connections between railroads engaged in interstate commerce, it is clear that the comprehensive powers conferred extend to junctions between main lines like those here in question."

And from page 250:

> "The establishment of the junction at that point would, if the objection is well founded, obviously imperil interstate commerce. The fact that it may do so, shows that the jurisdiction of the Commission over such connections must be exclusive, if the duty imposed upon it to develop and control an adequate system of interstate rail transportation is to be effectively performed. Moreover, the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction."

We assume that this Court, in speaking of the "use by other carriers" and of "the joint use of tracks," meant to refer to such use only in so far as it is covered by Section 3(4), which the opinion expressly mentions. The natural inference is that, where such use is dealt with only by a single section, which the Court mentions, the Court had such use in mind. As Section 3(4) deals only with the right to *compel* such use, it would seem that the language should not be taken as the expression of an opinion that a certificate was necessary to *permit* such use. It would, we submit, be doing violence to the language used and to the presumption against *dicta* to say that it was even a *dictum* to the effect that the Commission had jurisdiction over the matter presented in this case.

The theory of the Court below is summarized in its Conclusion of Law 10 (R. 579):

> "10. Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island when running its trains under the proposed trackage agreement, (1) would be operating a 'line of railroad' within the meaning of Section 1(18), (2) would be undertaking the 'extension of its line' and engaging 'in transportation * * * by means of such extended line,' and (3) would be preventing an abandonment,

which might occur if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings of the State authorities."

These three grounds are discussed, respectively, in Points VI, VII and VIII.

D.

The only section of the Act to deal with use under trackage rights is Section 3(4). The carriers recognized this. Their application to the Commission was for a certificate, under Section 1(18), permitting continuance of use, and for an order, under Section 3(4), requiring the use on the terms and for the compensation agreed upon by the parties (R. 72). The Commission properly dismissed the latter part of the application, on the ground that Section 3(4) applied only where compulsion was necessary; but assumed jurisdiction under the first part (R. 337). Curiously enough, the Commission assumed power to approve the agreement under the first part, although the carriers sought approval of it under the second part which the Commission dismissed.

The policy of Congress, as revealed in the act, had two aspects, (1) to prevent unnecessary construction and additions, and (2) to secure the fullest utilization of existing facilities.* To carry out the first, it put a check upon new construction, the acquisition of lines, and the operation of lines so constructed or acquired—matters which it regarded as not beneficial *prima facie*. It did this by requiring, under Section 1(18), a certificate from the Commission before any of these things could be done. To carry out the second part of its policy, Congress, deeming the full utilization of existing facilities to be *prima facie* beneficial, put no restrictions upon voluntary use and even provided for compelling use, under Section 3(4). It thus dealt with use under trackage rights only in so far as compulsion was necessary in order

* "The public interest requires the fullest utilization of existing terminal facilities in the interest of all the railroads which the industries located upon the terminals desire to use" (*Hastings Commercial Club* v. *C. M. & St. P. Ry. Co.*, 107 I. C. C. 208, 218).

to secure it. Voluntary arrangements of this character were left to the judgment and discretion of the parties involved; and permission was not required for the exercise of such use when voluntarily agreed to. The Commission was not burdened with onerous inquiries into acts presumed to be beneficial, which might degenerate into *pro forma* activity and mere rubber stamping.

The provisions of Section 1(18) do not apply to the use presented in the present case—the joint use of existing interstate tracks, under trackage rights. It applies only to things involving increased capital charges—extension, construction and acquisition. No new or added line is involved here. The tracks used are existing tracks and are not superfluous. The Long Island is not extending *its* line. It is not *operating* a line, but is merely operating *over* a line. It merely enjoys the use of tracks managed and controlled by the Pennsylvania. This use accords with the policy of the act, and does not come within the letter or spirit of Section 1(18).

As the certificate is unsupported by law, the whole of it must fall, including the condition which is dependent upon it.

POINT II.

The statements by those in charge of the Transportation Act in Congress confirm the view that the purpose of Section 1(18) was merely, by restricting construction, to prevent the unnecessary duplication of existing facilities.

If any doubt could be entertained that Section 1(18) applies only to construction and not to use, it would be proper for this Court to take into consideration the statements made in Congress by those who drew and sponsored the bill (*United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *Duplex* v. *Deering*, 254 U. S. 443, 474; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 278). We submit that there can be no doubt that the provision must be construed as

applying only to construction; and cite the following merely in confirmation of the view maintained in the preceding point:

House Report No. 456 (66th Cong., 1st Sess.), submitted with H. R. 10453 by Mr. Esch from the House Committee on Interstate and Foreign Commerce on November 10, 1919, which dealt with the amendments to the Interstate Commerce Act, Section 1, embodied in Transportation Act, Section 402, I. C. A. Section 1(18)-(22), T. A. text division 146-152, said:

> "Section 402 further provides that extensions of an existing railroad or the construction of a new line or the abandonment of a line shall not be permitted unless and until there shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require such *construction* or abandonment. *A like provision can be found in the statutes of a number of States.* Your committee believes that the requirement of such a certificate, so far as *extensions* are concerned, will tend to stabilize existing conditions and prevent *the construction of unnecessary or parallel lines* which, without any reasonable hope of profitable operation, would become a burden to the public. A similar provision in the laws of several States has proven successful in preventing the *construction* of weak lines." (Italics ours.)

In a speech, November 11, 1919 (C. R. V. 58, pp. 8309-8319), before the House Committee of the Whole on presenting H. R. 10453, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, Mr. Esch, Chairman of the House Committee on Interstate and Foreign Commerce, which prepared H. R. 10453, said:

> "We believe one main cause of the so-called 'weak sister' has been the unrestricted right of railroads to be *built* wherever their projectors thought fit.
>
> * * * * * * *

How does this bill stop that? In this way: Before a road or an extension thereof can be *built* it must get what is called in this bill a certificate of convenience or necessity from the commission as a condition precedent to the *building* of a single rod of the extension or of the new line.

* * * * * * *

This is not new law. Several of the States have this same kind of law now, notably the State of New York and the State of Wisconsin and other States, and the law has worked successfully. It has prevented *the construction of new lines* that could not by any possibility have any hope of meeting operating expenses, not to say anything about profits. It would prevent *the construction of some of these short lines* which may have no hope of ultimate financial success. In every way we have felt that this provision would lessen the number of 'weak sisters,' would prevent *the creation of any new ones,* and would strengthen the existing lines. We can get better service by strengthening the existing line than by *creating a rival or parallel line* which would diminish the ability of the first line to make further improvements and betterments." (Italics ours.)

In a speech, December 17, 1919 (C. R. V. 59, pp. 748-750), before the Senate, as in Committee of the Whole, on consideration of S. 3288, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, I. C. A. Section 1(18)-(22), T. A. text divisions 146-152, Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, which prepared S. 3288, said:

"I do not remember just how many States have legislation of this character, but there is a very considerable number of the States which for the protection of their people and the better regulation of their commerce have adopted provisions substantially like the one now sought to be eliminated from the bill.

It presents to the country a question which ought to be considered and ought to be decided without passion or prejudice, and ought to be decided without

respect to the effect which it is supposed it would have upon any particular part of the United States. If there is any one thing from which the transportation system of the country, taken as a whole, is now suffering, it is from the unguided, uncontrolled right of owners to *build* railroads wherever they may see fit to *build* them and whenever they can avail themselves of an opportunity to sell at a profit the securities based upon the supposed *construction*.

The railways of the United States are not built where they should have been *built*. Everybody understands that. A great many have been *built* that never should have been constructed. We are now under the disadvantage of having developed a system which must be maintained because communities have been built up along the railways, and their interests can not be disregarded in the regulations which we shall adopt. The whole trouble to which I referred in my opening statement has arisen because of the *building* of railways simply to make money out of their *construction* and without regard to the possible profit of their operation.

* * * * * * *

We propose here to grant to a governmental body the right to survey the situation, and then *say*, as to a railroad which is to be a common carrier and to be engaged in interstate commerce, *whether* under the circumstances, looking at the future of the community and the opportunities for traffic and everything of that sort, *it is a fair and a reasonable venture upon which the people of the country will be called upon eventually to pay a return.*" (Italics ours.)

In a speech, December 14, 1919 (C. R. V. 59, pp. 862-863), on consideration of S. 3288, which dealt with the amendment of the Interstate Commerce Act, embodied in Transportation Act, Section 402, Senator Robinson said:

"One of the fundamental principles and purposes of this bill is to so organize the railroads of the United States and to so consolidate them into a number of competing systems that hereafter the rates may be so adjusted that all railroads may be maintained. If you strike out this provision you weaken the con-

solidation features of this bill. It is true that in all probability in the future there will not be so many miles of railroad *constructed* the construction of which the public interest does not justify as in the past; but if we are to reorganize the railroads and put them on a sound financial basis we ought not to leave it to the power of any one in any locality to undo the very thing we are trying to do: * * *.

The purpose of this provision in the bill is to recognize as the controlling consideration the right and interest of the public to have reasonable and adequate transportation facilities and *to escape payment for transportation facilities that are not needed and are mere duplications of existing facilities.*" (Italics ours.)

POINT III.

The previous attitude of the Interstate Commerce Commission did not give rise to a practical construction which can be considered in construing the plain language of the statute.

In its brief before the Court below, the Interstate Commerce Commission relied upon the rule that a construction of a statute, made by a body charged with the enforcement of it, is entitled to great respect, and, if acted upon for a number of years, will not be disturbed except for cogent reasons.

In the first place, not this rule, but another, is the one that applies here. The rule relied upon by the Interstate Commerce Commission applies only where the language of the statute is ambiguous and susceptible of two reasonable constructions; and a custom of the department, however long continued by successive officers, must yield to the positive language of the statute. The doctrine of contemporary construction is not given weight where, as here, there is no balance between two reasonable constructions (*United States* v. *Graham,* 110 U. S. 219, 221; *Houghton* v. *Payne,* 194 U. S. 88, 99-100).

In the second place, the conduct and attitude of the Interstate Commerce Commission was never such as to raise a "contemporaneous" or a "practical" construction that Section 1(18) applied to use under trackage rights. "Contemporaneous" it certainly was not; for, when the history of the Act was fresh in mind, the Commission held that the section did not apply to trackage rights, and dismissed applications for such certificates.

Nor was the subsequent action of the Commission of such character as to raise a practical construction. Upon solicitation by applicants who urged that the question was an open one and who desired to observe every possible formality to insure the validity of their undertaking, the Commission issued certificates, being careful, however, to make it clear "that in thus disposing of the matter we do not hold that such certificate is a prerequisite to the lawful renewal of the agreement in question," and emphasizing that it was issued solely because "it is an open question whether the transaction in question is one that requires our approval under paragraph (18) of section 1."

We submit that, in order to invoke the doctrine of practical construction, it is not enough to show merely that the department acted. It must appear that the action was based upon the conviction that the proper construction of the statute required it. Here, as will appear, the Commission issued its certificate not on the ground that the requirement was clear, but on the ground that it was "an open question." In such case, the Court is obviously not bound to consider the *act* and to ignore the *opinion* of the Commission. No light is thrown upon the meaning of the language, except by the conviction of the department when reinforced by its action thereon.

In *Public Convenience Application of T. O. & E. R. R.*, 67 I. C. C. 484 (1921), the Interstate Commerce Commission said:

> "Upon consideration of the record, we find * * * that the arrangement for operation of the trains of either of the applicants over the line of the other is

substantially equivalent to a trackage right only.* Under the circumstances, it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18) of section 1 of the act, and that certificates are unnecessary.

An order dismissing the proceedings will be issued accordingly."

In *Copper Range Railroad Co.*, 67 I. C. C. 502 (1921), on an application to abandon certain joint use of a station and certain trackage rights, the Interstate Commerce Commission said:

"Upon consideration of the record we find that the abandonment proposed in the application consists in cessation of operation by the applicant over a portion of the tracks of the Chicago, Milwaukee & St. Paul Railway Company and the use of the station of the latter company at Mass, Mich., under a trackage right conveyed by contract. Under the circumstances it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18), section 1 of the act, and that a certificate is unnecessary.

An order will be entered dismissing the proceeding."

In *Cleveland Passenger Terminal Case*, 70 I. C. C. 659, 662 (1921), the Interstate Commerce Commission said, after a rehearing:

"We further find that the contracts proposed to be made by the Central with the Big Four and the Nickel Plate grant to the Central trackage rights only and that authority from us to exercise such trackage rights is unnecessary.

A certificate and order will be issued accordingly."

In *Operation of Sherman, Shreveport & Southern R. R.*, 76 I. C. C. 771, 773 (1923), the Commission said:

"As both of the lines between Waskom and Shreveport, over one of which the applicant might operate

* "We have defined the term 'trackage rights' as the right of one carrier to use the tracks of another for a compensation usually varying with the extent of the use" (*Louisiana, A. & T. Ry. Co. Operation*, 170 I. C. C. 602, 606).

> under trackage rights, are at present operated in interstate commerce, a certificate of convenience and necessity under paragraph 18 and following of section 1 of the interstate commerce act is not necessary, and, therefore, so much of the application as seeks authority to acquire and operate under trackage rights will be dismissed."

In *Chesapeake & Ohio-Norfolk & Western Trackage Rights*, 72 I. C. C. 471, 472 (1922), decided prior to the *Sherman* case above, the Commission said:

> "It is an open question whether the transaction in question is one that requires our approval under paragraph (18) of section 1 of the act. However, the applicants have sought that approval and the jurisdictional requirements have been complied with. A certificate will, therefore, be issued. *It must be understood, however, that in thus disposing of the matter we do not hold that such certificate is a prerequisite to the lawful renewal of the agreement in question.*" (Italics ours.)

This attitude indicates that the Commission had not altered its previously expressed view that Section 1(18) did not apply to trackage rights; but, for the convenience of the applicant, merely adopted the practice of putting the validity of the undertaking beyond question, by granting a certificate instead of dismissing the application. The case shows that the action of the Commission was not based upon an opinion that Section 1(18) did apply to trackage rights.

This practice was followed in *Missouri-Kansas-Railroad Company of Texas Reorganization*, 76 I. C. C. 651 (1923), where the trackage rights were merely part of and incidental to a larger program involving acts which did require a certificate, and where, as the Commission observed, "no objection to the granting of the applications has been presented to us" (p. 655). It was also followed in a number of cases, some of which are cited in the footnote to *Chicago & Alton R. R. Co.* v. *T., P. & W. Ry. Co.*, 146 I. C. C. 171, 181. In such cases, the Commission was at pains to repeat in its reports that there was "no objection." In many of them the

trackage rights figured incidentally merely to plans which involved other activities which did require certificates. The presumption is that the practice continued for the same reason for which it was begun, namely, the convenience of the applicant.

In *Operation of Line by A., T. & S. F. Ry. Co.*, 94 I. C. C. 318 (1924), where there was "no objection," a certificate was issued, the Commission saying (pp. 319-320):

> "The applicant contends that neither the letter nor the spirit of paragraph (18) of section 1 of the act requires it to secure a certificate of public convenience and necessity to operate over the spur because such operation is carried on under trackage rights. The applicant has moved to dismiss the application on the ground that we are without jurisdiction in the premises. We are of the opinion that we have jurisdiction. *The proposed operation is more than an operation under an ordinary trackage right. The agreement of June 26, 1919, is in the nature of a joint operating contract.*" (Italics ours.)

Here it appears that the Commission acted on the ground that the proposed agreement was not for a mere trackage right.

In *Proposed Operation By N. P. Ry.*, 111 I. C. C. 689 (1926), the Commission denied an application. In answer to the contention of interveners, the Commission said (p. 696):

> "We are of the opinion that the provisions of paragraph (18) of section 1 cover the operation here proposed."

In that case, however, it appeared (p. 696):

> "It is admitted that the new line is not as safe or as desirable for operation as the old line. The proposed operation would require considerable additional investment of capital and would result in increased cost of operation without a corresponding benefit, so far as appears, of increased revenues, and would thus tend to increase the cost of transportation to the traveling and shipping public."

Similarly, *Operation By Pearl River Valley R. R.*, 111 I. C. C. 580 (1926), although designated as a case of operation "under trackage rights," seems to have been more than that. The applicant proposed "to operate the lumber company's line as an extension to its own main line under a trackage agreement"; to "use and operate the line jointly with the lumber company"; to "assume the cost of necessary repairs"; and "to pay an annual rental of $1" (p. 581). It is apparent that the control of this line, approximately eight miles long, really passed to the applicant and that it was the lumber company which reserved the right to use it. Under these circumstances, the case fell within that part of paragraph (18) which deals with the right to "acquire or operate." It was the lumber company rather than the applicant which thereafter enjoyed trackage rights. Here, too, there was "no objection."

In *Unified Operation At Los Angeles Harbor*, 150 I. C. C. 649 (1929), a certificate was granted where there was "no objection" (p. 650). The agreement there approved, however, seems to have been in the nature of a joint operating contract (see p. 660), over which the Commission took jurisdiction in *Operation of Line by A., T. & S. F. Ry. Co., supra.*

It is unnecessary to follow in detail the progress of the Commission through a multitude of cases. It is sufficient to point out the fact that the Commission began with, and acted upon, the view that it had no jurisdiction over trackage rights; that it began to issue such certificate, where there was no objection, not because it deemed such course to be required by the statute but for reasons of convenience; that it presumably continued such course for the same reason; and that, until the present case arose, it was never called upon to, and never did, declare that it had altered its original view.

We submit that the action of the Commission, under these circumstances, cannot possibly constitute a practical construction that Section 1(18) applies to trackage rights; and that, where it appears that the Commission itself has indi-

cated its belief that it has no such jurisdiction, this Court is not bound to draw the conclusion that it has, from the mere fact that certificates have been issued for a different reason.

POINT IV.

The provisions of Section 1(18) are not retroactive; and, even assuming that they apply to operation under trackage rights, do not apply to operation begun ten years before the paragraph was enacted and carried on continuously ever since.

The provisions of Section 1(18) were not retroactive in their operation (*Detroit Terminal R. Co.* v. *Pennsylvania-Detroit R. Co.*, 15 Fed. [2nd] 507).

In *Public-Convenience Application of T., D. & E. R. R.*, 67 I. C. C. 484, the Interstate Commerce Commission itself said:

> "Upon consideration of the record, we find that construction of the extensions was begun in good faith prior to the effective date of paragraph (18) of section 1 of the interstate commerce act and was diligently prosecuted to completion; * * *. Under the circumstances, it is our opinion that the proposals do not fall within the jurisdiction conferred by paragraph (18) of section 1 of the act, and that certificates are unnecessary.
>
> An order dismissing the proceedings will be issued accordingly."

In *Public-Convenience Application of U. & N. Ry.*, 67 I. C. C. 554, 555, the Commission said:

> "We therefore find that construction was begun in good faith prior to the effective date of section 1, paragraph (18), and that the work has been prosecuted with reasonable diligence, under the circumstances, in accordance with the original plan. It follows that no certificate of public convenience and necessity is required.
>
> An order will be entered dismissing the proceeding."

In *Piedmont & N. Ry. Co.* v. *United States,* 30 Fed. (2nd) 421, 425, it was said:

> "The petitioner, relying upon this history of its activities, and upon the principle of law laid down in Detroit Terminal R. Co. v. Pennsylvania-Detroit R. Co. (C. C. A.), 15 F. (2d) 507, 509, contends that it had actually commenced construction in a substantial way before 1920, by the acquisition and building of its present lines; and that since this work was but a part of an entire unitary project, never abandoned, it must be held that the petitioner had undertaken the construction of the proposed extension long before paragraph 18 of section 1 of the act was passed.
>
> The Commission has given effect to the exception in paragraph 18 in the public convenience applications of the following roads: Texas, Oklahoma & Western R. R., 67 I. C. C. 484; Uvalde & Northern Ry. Co., 67 I. C. C. 554; Gulf Ports Terminal Ry. Co., 71 I. C. C. 759; San Antonio & Aransas Pass Ry. Co., 111 I. C. C. 483. It also passed an order on May 25, 1920, three months after the effective date of the act, in which it notified all carriers, contemplating or engaged in work of construction, to notify the Commission of the facts and circumstances, in order that it might determine whether the work had been actually undertaken as contemplated by paragraph 18, and whether a certificate of convenience and necessity would be required. It announced that if the projected extension or construction should have been actually undertaken in good faith within 90 days after the approval of the act, a certificate would not be required, but that the undertaking must embrace not merely a purpose or intent to extend and construct, but also the actual doing in good faith of acts calculated to complete and effect such purpose. It said that a mere provision in a charter or prospectus, or the making of a preliminary survey, would not in its opinion constitute an undertaking."

The Court below found that the Long Island began to use the tracks of the Pennsylvania in 1910 and has continued that use without interruption ever since (R. 573). In its report, *Long Island R. Co. Trackage,* 162 I. C. C. 218, 220,

the Interstate Commerce Commission found that "joint operation began prior to the effective date of the transportation act, 1920, and has been continuous" (R. 337).

Accordingly, we contended before the Commission and before the Court below that, even if Section 1(18) did apply, in general, to operation under trackage rights, it did not apply to this particular case, where the operation had begun ten years before the Transportation Act of 1920 and has been carried on continuously ever since.

The assumption that use under trackage rights does come within the scope of Section 1(18) necessitates an inquiry as to the particular parts of the paragraph which are supposed to apply to the situation actually presented here, namely, a situation where the Long Island began its continuous use as early as 1910, ten years before the paragraph (which was not retroactive) became effective.

It must be conceded that such use does not come within the parts which require a certificate from the Commission before a carrier "shall undertake * * * the construction of a new line of railroad" or "shall abandon all or any portion of a line of railroad, or the operation thereof." The only parts which can possibly be claimed to apply are those which require a certificate before a carrier "shall undertake the extension of its line of railroad," "shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad."

Paragraph 18 clearly distinguishes between *undertaking* an "extension" and *engaging in transportation* over such "extended line." In view of the fact that the present activity of the Long Island began in 1910, it cannot be said, at this date, that the Long Island, in continuing such use, is *undertaking* "the extension of its line of railroad." The "extension," if such it be, was *undertaken* but once, namely, in 1910. All that can be claimed now is that, by continuing what it then *undertook*, it is engaging in transportation "over or by means of such additional or extended line of railroad." It, therefore, seems that the part of the paragraph which

requires a certificate before a carrier "shall *undertake* the extension of its line of railroad," must also be excluded from consideration.

Moreover, it seems absurd to say that, although a carrier would not have to secure a certificate for an "extension" undertaken in 1910, it would have to secure a certificate, in order to continue using an "extension" so undertaken. Accordingly, it would also seem that the part of the paragraph which requires a certificate before a carrier "shall engage in transportation over or by means of such * * * extended line of railroad," must also be excluded from consideration.

The only other part remaining to be considered is that which requires a certificate before the carrier "shall acquire or operate any line of railroad." It cannot be said that the Long Island has acquired the track which it uses, but, if it were said that it has, it is apparent that it acquired it in 1910. It cannot be said to acquire it anew each day that it continues to use it.

Our contention is that to "operate" is to direct or superintend the working of the road—which the Long Island does not do here. That this is the meaning which the statute gave to the words "operate any line of railroad" is shown by the fact that later on the statute says explicitly "or shall engage in transportation over or by means of such additional * * * line." We submit that Congress did not use the word "operate" to convey the same meaning as the words "engage in transportation." Here, again, we think it reasonable to say that the carrier would not be required to obtain a certificate in order to continue the use of something which it had lawfully *acquired* before the Act took effect.

It, therefore, seems safe to assume that use under trackage rights does not amount to the construction, acquisition or abandonment of a line of railroad; that the continuance of such use, begun before the Act became effective, does not constitute the *undertaking* of an "extension"; and that the use of Pennsylvania tracks by the Long Island must come, if at all, within those parts of Section 1(18), which use the words "operate," "operation" and "engage in transportation."

We will assume, for the purpose of argument, that the words "operate" and "operation" mean the same as "engage in transportation," thus bringing the matter down to a point where the claim is that Section 1 (18) covers cases where one carrier uses the tracks of another, by operating cars over them, jointly with the owner.

Assuming, then, that the statute would apply to such use initiated since 1920, we point out that the use in question began in 1910 and has been continuous. It would seem that, since the paragraph is not retroactive as to construction or extension or acquisition or abandonment, all of which come clearly within the scope of the Act, it cannot be retroactive as to "operation" which doubtfully maintains its claim to a place in the sun. We think that, even if the statute had expressly included the exercise of trackage rights, this would have to be construed, like the other and clearer items, as giving the Commission no jurisdiction over use under trackage rights which were already being exercised when the Act went into effect. We submit that the same rule as to the non-retroactive operation of the statute should be applied to things which are doubtful just as well as to things that are clear.

The answer which the Court below made to our arguments is found in its Conclusion of Law 7 (R. 579):

> "The contention of the Transit Commission that the order of the Interstate Commerce Commission is invalid because it affects an existing relation is without foundation."

In ruling out our contention that the order was invalid because it affected an existing relation, the Court might have been proceeding on the view, either (1) that there was an existing relation but that the Act was retroactive, or (2) that the Act was not retroactive but that there was no existing relation. Apparently, it proceeded upon the latter view; for its Finding of Fact 19 was (R. 577):

> "The trackage agreement approved by the Transit Commission expired several years ago. From that

> time until the new trackage agreement dated March 10, 1932, which was approved by the Interstate Commerce Commission, the Long Island was a mere tenant at will, whose right to use the Pennsylvania terminal had expired."

The Interstate Commerce Commission claimed that it had jurisdiction because Section 1(18) embraced "operation." We replied that, as the Act was not retroactive, jurisdiction could extend only to "operation" begun after the Act, and that, as this "operation" had begun before that, the Commission had no jurisdiction over it. It has never been denied that this "operation" has been continuous. In its report, *Long Island R. Co. Trackage,* 162 I. C. C. 218, 220, the Interstate Commerce Commission said that "joint operation began prior to the effective date of the transportation act, 1920, and has been continuous" (R. 337); and, in its Findings of Fact 19 and 20, the Court brought the matter down to date, by finding that from the time the trackage agreement approved by the Transit Commission expired until the new trackage agreement dated March 10, 1932, "the carriers continued to operate under conditions approved by the Transit Commission" (R. 577). Our contention was that, if the Interstate Commerce Commission did have jurisdiction over operation under trackage rights, it had no more jurisdiction over such operation begun prior to the Act than it had over the continuance of transportation by means of additional or extended lines, acquired or constructed prior to the Act. Assuming that "operation" were important, we felt that it was toward "operation" that reasoning should be directed.

The Court, however, supported the jurisdiction of the Commission on a different ground. It appeared that the written agreement which had originally fixed the terms and conditions of operation was for a limited term which had expired. The Court treated the expiration of this agreement as equivalent to a discontinuance of operation—and this, in spite of the fact that operation was seen, and found, to be continuing. It apparently held that the operation had *legally*

ceased (although notoriously continuing *in fact*), because the written agreement fixing the rental had expired by its terms.

It is not easy to see how the legal conclusion, even if sound, that the right to operate ceased when the written agreement terminated, proves that long-continued operation becomes subject to the jurisdiction of the Interstate Commerce Commission. The thing assumed to be embraced by Section 1(18) was operation, not written agreements. We submit that operation begun before the Act was thereafter carried on continuously does not come within its jurisdiction merely because the parties from time to time revise the terms under which it is carried on.

Assume that operation had actually been discontinued in fact after the Act. That, of itself and in the absence of a desire to resume operation, would not occasion the issuance of a certificate *permitting* operation, which was what the carriers sought in this case. A mere discontinuance of operation would call, at most, for a certificate of "abandonment." But here the certificate was sought and granted to permit operation, not abandonment. Such certificate would be called for only in the case of *new* operation, or, at most, where there had been a definite discontinuance of long-continued operation and an attempt to renew it—a situation not presented here. Our contention was that there was no new operation, because the operation had been continuous. To meet this, the Court below treated the operation as having theoretically expired; but, in order to meet the objection that the certificate was to permit operation and not to authorize its discontinuance, it treated the operation as actually continuing.

While we contend that it is the fact of operation, rather than the right to operate, which should be determinative in such case, our principal attack is directed against the assumption that, when the written agreement terminated, the Long Island ceased to have a *right* to operate. The Court's own finding that the Long Island is "a mere tenant at will" seems inconsistent with this; for a tenant at will has an

estate—of uncertain terms, it is true, and capable of being terminated by proper notice, but conferring rights upon the tenant, so long as the tenancy continues. In New York, the proper notice for termination of a tenancy at will is thirty days (N. Y. Consolidated Laws, Chap. 50; Real Property Law, Sec. 228). If the Court's statement means that the Long Island has no right as against the Pennsylvania to remain in occupancy for a long, fixed term, it is correct; but, if it means that it is a trespasser and can be ousted at any time, it cannot be maintained. It cannot possibly mean that the Long Island is not operating, or that it is operating without right.

Actually, however, the Long Island was not a tenant at will but a tenant from year to year. It entered into the terminal pursuant to a valid agreement, duly approved by the State authorities. Several similar agreements, so entered into and approved, have been in force (R. 341, 566). The agreement approved by the Transit Commission on July 28, 1925, was for the term of one year and was retroactive to July 1, 1923 (R. 336). As the Interstate Commerce Commission found, "it technically expired on December 31, 1925" (R. 337). After it had so expired, the rental, as the answer of the carriers admits, "was computed and paid in the same manner as if the said expired agreement had been in force and effect" (R. 48), and the carriers, as the Court below found, "continued to operate under the conditions approved by the Transit Commission on July 28, 1925" (R. 577). This they were legally obliged to do, since a tenancy from year to year was created and the conditions of the original agreement applied, when the Long Island held over with the acquiescence of the Pennsylvania (*Kennedy* v. *City of New York*, 196 N. Y. 19, 23; *Peyton* v. *Smith*, 5 Pet. 485, 490 (star pages); *Black* v. *La Porte*, 271 Fed. 620, 623).

The Court below said in its opinion (R. 572):

> "The argument would apparently preclude jurisdiction perpetually, whenever a carrier having a lease in 1920 holds over with the acquiescence of its lessor. Such a result has no rational basis."

As a possible rebuttal of this charge of utter irrationality, delivered *ex cathedra,* attention is invited to the following considerations:

We are dealing here with a trackage right, claimed to come under Section 1(18), which grants use without control, and not with a lease, coming under Section 5(2), which gives both use and control. As to operation under a trackage right, begun prior to 1920, it is conceded that the result feared by the Court below would follow, so long as the use were continued with the acquiescence of the owner. We claim, however, that the Interstate Commerce Commission should not be held to have jurisdiction merely because, unless it were given jurisdiction, it would have no jurisdiction. If, before 1920, a physical extension or a new road had been built or acquired, the Commission would have been perpetually precluded from jurisdiction, under Section 1(18), over its operation. If, in 1910, the long Island had begun to use the terminal under a written agreement giving a perpetual trackage right, the Commission would have been equally precluded from jurisdiction, under such paragraph. So, if it had entered into no written agreement or had entered into a written agreement expressly providing for a tenancy at will, the Commission would have been precluded from jurisdiction, under Section 1(18), so long as the use continued; and the Commission would have had no jurisdiction under any other section, since there is none which gives it authority, independently, to regulate the mutual agreement, by which the parties themselves determine what the rental shall be. How, then, can the Commission have jurisdiction over a tenancy raised by operation of law from their acts, when it would have no jurisdiction over a tenancy created by their agreements and acts, under sanction of law?

As the operation began prior to 1920, the right to issue a certificate must require, at least, a showing that operation is to be resumed after an actual discontinuance of such operation. We have shown that there was no break in operation and that the Long Island always had a right to operate. Can a break in operation be spelled out of the fact that this use had to receive the permission of the State?

Under the common law of the State of New York a railroad corporation had no authority to transfer or lease its road, unless authorized by statute (*Troy & Boston R. R. Co.* v. *Boston, Hoosac Tunnel & Western Ry. Co.*, 86 N. Y. 107, 117). Section 148 of the Railroad Law of the State of New York (N. Y. Consolidated Laws, Chap. 49) gives a qualified authority, as follows:

> "Subject to the permission and approval of the commission having jurisdiction, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. * * *"

Under this provision, the carriers applied for and received the permission of the Commission having jurisdiction. This permission was subject to the condition that the operation should be conducted according to terms and conditions approved by the State Commission. Various agreements embodying these terms and conditions were from time to time approved by the State Commission (R. 316, 566). Such terms and conditions were binding upon the carriers, until another agreement fixing other terms and conditions was duly approved. Accordingly, the carriers were obligated to, and did, up to the time when it was claimed that the agreement of March 10, 1932, approved by the Interstate Commerce Commission, went into effect, operate under the conditions last approved by the Transit Commission (R. 48, 577). Indeed, it was because the carriers were bound by the condition of the permission, to operate according to terms of the last agreement to be approved by the State authorities, that the carriers found it necessary to apply to the Interstate Commerce Commission for its approval of the new agreement (March 10, 1932), which provides that "any agreement heretofore existing * * * shall be in all things superseded by this agreement as of January 1st, 1931" (R. 561).

Other carriers also exercise trackage rights into the same terminal. With certain exceptions, their situation is the same as that of the Long Island. For one thing, they are not under the same necessity of securing permission from the State. Again, they operate across State lines, while the Long Island does not. Furthermore, they are independent and capable of dealing with the Pennsylvania at arm's length, while the Long Island is controlled by the Pennsylvania and, if it were not for State control, would have to "agree" to any rental the Pennsylvania determined to exact. The Interstate Commerce Commission has never interfered with these other carriers (see Sec. 1[20]), when their trackage agreements expired (R. 550, 403). Aside from these things, the situation is the same for all. Do these differences permit a construction of Section 1(18) which gives the Interstate Commerce Commission jurisdiction over use by the Long Island, but not over use by the other carriers?

It would seem that Procrustean methods alone could draw from the plain general language of Section 1(18) a construction that would deny to the Interstate Commerce Commission jurisdiction over the Lehigh Valley which operates, across State lines, into the terminal from the west, but would grant it over the Long Island which operates, entirely within the State, into the terminal from the east.

As the Long Island operation began before the statute became effective and as there has since been no break in the operation, in the relation of the parties, in the right to operate, in the permission granted by the State, in the obligation to operate according to the conditions accompanying the permission, or in the observance of such conditions, it is impossible successfully to contend that this operation began, or can be deemed to have begun, after Section 1(18) went into effect. It follows, therefore, that the Interstate Commerce Commission was not called upon, and had no authority, to issue a certificate as a condition precedent to the further continuance of such operation, and, therefore, no power to attach the condition requiring the substitution of other terms and conditions for those under which the carriers were then operating.

POINT V.

Even assuming that the Commission did have jurisdiction over this particular trackage right, it would extend merely to the granting of the certificate; and the matter of controlling the contractual rights and obligations of the parties would remain with the State.

The Court below found in its Conclusion of Law 8 (R. 579):

> "8. The contention that the certificate of convenience and necessity ought not to have been made upon the condition imposed cannot prevail."

The reason given in the opinion was that Section 1(20) "expressly empowers the Commission to attach conditions to a certificate" (R. 572). Our contention was not so crude as to have been based on ignorance of this fact. It was that even this provision did not give unlimited power to the Commission, and that, assuming the power to issue a certificate at all, the Commission had found a state of facts which entitled the applicants to a certificate without any condition whatsoever (R. 338).

The purpose of Section 1(18) was to prevent interstate carriers from weakening themselves (*Texas etc. R. R.* v. *Northside Ry.*, 276 U. S. 475, 479); and so, when the Commission found in *Long Island Railroad Company Trackage*, 162 I. C. C. 218, 221-222, that "the service to the public and the benefit to the carriers by the operating arrangement between these companies are entirely uncontroverted" and that "the need for continued operation by the Long Island in this manner may be safely assumed to have been demonstrated" (R. 339), the Commission should have issued its certificate, if it had power to do so.

In spite of the provisions of Section 1(20), the power of the Commission to impose conditions is not unlimited (*United States* v. *Chicago, etc., R. Co.*, 282 U. S. 311, 324, 342); and our contention was that, when the Commission

had found, as in effect it did, that public convenience and necessity required a continuance of operation, it was under a duty to issue its certificate, and that its action in withholding it, in order to assume a power to regulate the terms—a matter over which it otherwise had no power—was arbitrary.

We do not contend that the financial effect of any arrangement which comes within its jurisdiction is not an item to be considered in determining whether public convenience and necessity permit it; but we do contend that, after a finding that the effect is not to weaken either carrier, applicants have made out a clear case and the certificate should be issued without condition.

This question can be considered as if it involved only private corporations and their rights of property, and was free from any connection with the State. Suppose that the Pennsylvania and the Lehigh Valley had made a *bona fide* attempt to safeguard their respective interests and had embodied the meeting of their minds in an agreement, and, having met every requirement of the section, had been refused a certificate on the ground that the agreement did not accord with the Commission's idea as to its "fairness and reasonableness." What would the Court say when they came before it, contending that, by imposing an unwarranted condition, the Commission had deprived them of property rights to which they were entitled under the statute?

In order to justify its refusal to issue a certificate, the Commission was compelled to redefine the purpose of Section 1(18). According to this Court, that purpose was to see that carriers did not weaken themselves; but the Commission set for itself a still higher goal and one infinitely more difficult of attainment. In *Long Island Railroad Company Trackage*, 162 I. C. C. 218, 221, it said (R. 338):

> "The case is brought to issue mainly because of the possibility of increased fares on the Long Island, but consideration of the questions of rental, degree of use, and the like which are now presented must be weighed entirely on the showing of fairness and reasonable-

> ness and should not be influenced by the contingency emphasized by the protestants. The Pennsylvania and the Long Island are entitled to equally fair treatment in the matter."

The Interstate Commerce Commission appears to have altered its view as to its right to meddle with the rental, just as it changed its view as to its right to deal with trackage rights.

In *Chicago & Alton Railroad Co.* v. *T. P. & W. Ry. Co.*, 146 I. C. C. 171 (1928), the T. P. & W. had entered into an agreement granting to the Alton the right to use jointly with it certain main tracks. In 1927, the T. P. & W. exercised its election to cancel the agreement, but later offered to renew it at a minimum annual rental of $50,000. The Alton regarded this as excessive, and filed a complaint with the Commission, praying for an order under Section 3(4) and for an emergency order under Section 1(15), requiring the T. P. & W. to permit the Alton to operate its trains over said tracks.

The Commission issued an emergency service order under Section 1(15), but subsequently vacated it. Aside from this, the application resulted only in opinions, majority and dissenting. The majority held that the Commission had power, under Section 3(4), to require the use of the tracks, and, under Section 1(18), to prevent discontinuance of operation. It made, however, no order under either section. It apparently hoped to frighten the parties into continuing the *status quo*, by its threat to prevent by injunction, under Section 1(20), the discontinuance of operation, which it said was prohibited by Section 1(18). After convincing itself that the contention "that the parties have a legal right to rely on the terms of their contract" could not be sustained, it concluded (146 I. C. C. 171, 182):

> "We express no opinion as to the adequacy of the rental or the propriety of the other terms and conditions under which the Alton is now operating over the tracks of the T., P. & W. We have no authority to

> adjust that matter in this proceeding. The law, no doubt, provides a remedy for any injustice in that regard."

That the Commission has no power to adjust the matter of rental is confirmed not only by the absence of specific delegation of such power, but also by the rule that a State power is not to be taken away as the result of doubtful inference (*Texas* v. *Eastern Texas Railroad Co.*, 258 U. S. 204, 217, 218; *Atchison Railroad* v. *Railroad Commissioners*, 283 U. S. 380, 393, and cases there cited).

The State power, exercised through Section 148 of the Railroad Law, is undisputed. Acting under this provision, the companies have made applications for the approval of their contract since 1910 and since the Transportation Act of 1920. It was to escape from the terms and conditions last approved (1925) by the State authorities that the companies applied to the Interstate Commerce Commission in 1929. Had the carriers not been bound by these terms, they would never have applied to the Commission, and the Commission would not have found it necessary to suspend the issuance of its certificate until an agreement was made which expressly superseded the existing agreement.

The Commission, in discussing the policies which it recommended, should be carried into law (1919 Ann. Rep., p. 2), outlined certain provisions as essential and expressly recognized the powers then vested in the States. Its recommendation of policy as to limitation of railroad construction, in response to which Section 1(18) was added to the Transportation Act in 1920, was as follows:

> "Limitation of railway construction to the necessities and convenience of the Government and of the public and assuring construction to the point of these limitations. The thought underlying the first part of this suggestion is that in some instances, for speculative or competitive reasons, railroads have been built in excess of the reasonable demand and in excess of the necessities of the territory built into, as well as of its reasonably prospective traffic. A railroad once

> built ordinarily must be operated and permitted to earn a living. The public should not be burdened with the maintenance of two or more railroads when one would substantially answer every legitimate purpose. In this connection it would be desirable that in the exercise of its powers the Congress should say that no railroad shall be constructed or extended that is to engage or is engaged in interstate commerce unless, *in addition to required authority from the State*, a certificate of public convenience and necessity is secured from Federal authority. * * *." (Italics ours.)

The Commission itself held that the terms of the agreement in this case were a matter of local concern, saying (R. 336):

> "It is true that the amount of rental which the Long Island pays to its parent company is a matter that primarily concerns intrastate passenger traffic, indeed hardly more than traffic within the suburban zone of the city, and that the public interest affected might appear to be entirely local."

Congress carefully considered the matter of granting to the Commission the power to pass upon the terms of agreements between carriers, but refused to encroach upon the authority vested in the States. While the bill that is now the Transportation Act of 1920 was pending in Congress, Congressman McClintic of Oklahoma offered, unsuccessfully, the following amendment (Congressional Record, November 15, 1919, p. 8578):

> "Provided, further, that the Commission is hereby given authority to require a carrier to maintain his present arrangement or to make new arrangements, relative to the joint use of depots, *upon such terms as shall be found by the Commission to be just and reasonable*. No carrier shall be allowed to discontinue the use of a depot in connection with another carrier until proper application has been made to the Commission." (Italics ours.)

Chairman Esch, one of the authors of the bill, in speaking of the amendment, used these words:

> "The matter which the gentleman from Oklahoma seeks to reach by his amendment lies almost wholly within the police power of the several states. There have been amendments offered to this bill seeking to preserve such police powers. The committee in framing the bill has sought not to encroach upon such powers. The matters of depots and joint use of depots is practically in the jurisdiction of the State Commissions, and all but one of the states have such Commissions. In such small matters the detail should be left within the jurisdiction of the state authorities, who know the situation, know the conditions, and know how best to meet the needs. There is, however, a provision in this bill providing for the joint use of terminals."

The rejection of the McClintic amendment shows that, while Congress vested the Commission with extraordinary powers, it did not include among them the right to dictate the terms of agreements between carriers, relative to the joint use of terminals.

Even assuming that Section 1(18) applies to operation under trackage rights and to such operation begun long prior to the Transportation Act, there is no power to dictate the terms of agreements covering such operation. The power of the Commission, in this respect, is limited to determining whether the operation is or is not consistent with public convenience and necessity. If its findings show that operation under the terms to be observed is beneficial to the public and to both carriers, it is under obligation to issue the certificate. It cannot refuse, in order that it may enforce the adoption of terms which it prefers but is otherwise powerless to exact. In the absence of express language such power is not to be implied, especially where, as here, it would unnecessarily deprive the State of an unquestioned power.

POINT VI.

The Court below erred in holding that the Long Island in operating, under trackage rights, over tracks of the Pennsylvania was operating a line of railroad, within the meaning of Section 1(18) of the Interstate Commerce Act.

In answer to our contention that Section 1(18), construed according to the rules of construction and particularly according to the rule of *ejusdem generis,* gave the Interstate Commerce Commission control only over undertakings which involved capital expenditures, such as the construction of new lines or extensions and the acquisition of lines, the Court below said that "the difficulty with this position is that it disregards the broad purposes of the Amendment to the Interstate Commerce Act (of 1920) under which Section 1(18) was adopted" (R. 569).

That is, the Court below subordinated or ignored the rule of *ejusdem generis,* because the conclusion reached by such method of construction would conflict with the "broad purposes" which it assumed had motivated the Congress in adopting the amendments of 1920.

What were these assumed "broad purposes" and how did the Court divine them? It said of the Act that "its general purpose was to control railroads, whose operations affected interstate commerce, in such a way as to avoid excessive expenditures by the building of unnecessary lines and to prevent injurious competition and the abandonment of useful arteries of commerce" (R. 569).

We have never questioned this proposition. In fact, we claim that it bears out our contention. We say that the purpose of the Act is *limited* to "building," to "injurious competition" and to "abandonment," and that it does *not* embrace the use of existing tracks under trackage rights, where none of these things is involved.

Clearly, in order to justify its conclusion that Congress intended to bring trackage rights within the provisions of

Section 1(18), the Court below had to invoke a purpose different from the above. It did so. It said that its conclusion that Congress had so intended was reached "in view of the settled governmental policy of control of interstate transportation by a single body charged with the duty of supervising it as a whole" (R. 570).

Although we deplore it, we need not pause to discuss the policy of first assuming for a statute a "general purpose" and then construing particular parts of it in such a way as to conform to such assumed purpose. We believe that there is greater assurance of getting at the true intent of the Legislature and less danger of judicial legislation, if the contrary course be followed and the "purpose" arrived at by generalization from the separate parts, interpreted and construed according to settled rules of construction. We are, however, not driven to defend this thesis, for, we submit, that even assuming such method, it should be followed only where there are clear and convincing indications of such "purpose."

We submit that, assuming adequate indications of any such purpose, the purpose stated is inadequate to justify the conclusion that trackage rights must be included under Section 1(18). We do not question that the policy is to have interstate transportation controlled through a single body, the Interstate Commerce Commission, rather then by numerous Federal agencies; but we submit that the fact that Congress gave control to a single agency, instead of several, furnishes no indication as to the extent of the powers which Congress gave to that agency. The fact that the Commission has all the powers which Congress has delegated hardly compels the conclusion that Congress has delegated any particular power.

The Court below did not say that its premise compelled that conclusion. Its Conclusion of Law 3 was (R. 578):

> "It is the settled governmental policy to control interstate transportation by a single body charged with the duty of supervising it as a whole; and, in view of this, it seems reasonable to construe the words

> 'operate any line of railroad,' found in Subdivision 18 of Section 1, as embracing any railroad having interstate relations, that runs its trains over the lines of another, under a trackage agreement entered into between the two roads."

Its conclusion was based upon its view of the assumed purpose of the Act. It went no further than to say that it was "reasonable" to construe the words "acquire or operate any line of railroad" as embracing mere use under trackage rights. It recognized that it was not driven to this conclusion by any irresistible necessity, for it conceded that "it is true that the clause might be interpreted as directed only to a railroad owning, leasing or maintaining the tracks used" (R. 570). It rejected this interpretation only because "it seems hard to justify a definition that would prevent national control of such important arteries of interstate commerce as are railroads using the tracks of other railroads engaged therein" (R. 570).

"National control" is, we submit, by no means synonymous with "control by the Interstate Commerce Commission." The power to regulate interstate commerce resides in Congress; and as Chief Justice Waite said in *Hall* v. *DeCuir*, 95 U. S. 485, 490:

> "This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution."

Congress, which alone determines to what extent interstate commerce shall be regulated, does not impair national control, when it decides to give its delegate no power over trackage rights. It is not obliged to push its power to the utmost possible extent; and, particularly in view of the

tentative and experimental way in which it has approached the regulation of interstate commerce, there is no presumption that it does legislate on any such basis.

It is not for the courts to criticize the wisdom of Congress or to remold its acts nearer to the heart's desire, through the exercise of its power to construe. All that the courts may properly do is to inquire whether the language used by Congress reveals an intent to exclude or to include a particular matter. In this case, the sole question is whether the words "acquire or operate any line of railroad" were intended to give the Interstate Commerce Commission control over the use of existing interstate tracks under trackage rights.

In our Points I, II and III, we have tried to show why the interpretation and, indeed, the construction of its language reveals a clear intent to refrain from dealing with trackage rights, except to the extent provided in Section 3(4). In this point, we have tried to show that "the difficulty with this position" as viewed by the Court below—its reasons for subordinating these considerations—are inadequate for the purpose, and that its method was wrong. It resorted to *construction* before exhausting *interpretation*. It tacitly conceded the force of our interpretation, but reached a different result by invoking "broad purposes" and "policy," which, even if admitted, were inadequate to support the conclusion reached. We submit that the intent of Congress, as shown by the considerations urged in our early points, cannot logically be overcome by the reasons advanced in the opinion and findings of the Court below.

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POINT VII.

The Court below erred in holding that the Long Island in operating under trackage rights over tracks of the Pennsylvania was extending its line of railroad, within the meaning of Section 1(18) of the Interstate Commerce Act.

The Court below held that the Long Island Railroad Company, in using jointly with the Pennsylvania the existing tracks of the latter, was undertaking "an extension of its line of railroad" and was engaging in transportation by means of such "extended line" (R. 579). It held that the term "extension of its line of railroad" was not confined to trackage built as an extension to an existing road owned by it, but embraced also the use under trackage rights of existing lines owned by another carrier (R. 578).

This conclusion was based partly upon a finding of fact and partly upon certain authorities referred to in its opinion.

A.

Its finding of fact was that "the same dangers that are to be guarded against when a railroad extends its line for its own use, or leases it for the sole use of another, exist where it agrees to a joint use by itself and another road" (R. 577).

It thus recognized that an obvious purpose of the statute was to control new construction, but it reasoned that, since the danger from joint operation over an existing road was the same as that from the construction of a new road, Congress must be presumed to have placed them both in the same category and embraced them both in the provision of Section 1(18).

Parenthetically, it may be pointed out that there was nothing in the evidence before the Court which afforded any basis for this finding, and we question whether such matter comes within the province of judicial notice. It must be

conceded that the conclusion is questionable, even if it be not admitted that it is contrary to the fact. New construction would involve an expenditure of fixed capital, an increase in the amount of valuation on which rates had to be based, a possible increase in the amount of securities, and the possibility of impairing the resources of one existing line by the creation of a new parallel or competing line. The joint use of facilities already constructed could do none of these things. Instead of increasing the physical structure, the rate base, and the securities outstanding, the use of existing tracks under a trackage agreement would leave all these things as they had been and would result in fuller utilization. Granting that additional operation would result in additional expenses, these would obviously be different in character from those caused by new construction. The burdens of a newly constructed line would consist of capital expenditures plus operating expenses, while the expense of operating an existing line would consist of operating expenses minus capital expenditures, and the existing carrying charges would not be affected. We submit that it cannot be regarded as established that the dangers from new construction and those from using existing construction are *the same*.

We submit that any force derived from an argument that the jurisdiction of the Interstate Commerce Commission over new construction must extend also to joint operation over existing construction, because the dangers arising from the two are the same, is destroyed by the dropping out of the essential link, namely, the finding of fact that the dangers *are* the same.

Moreover, be the relative dangers what they may, new construction is certainly different from the joint operation of existing facilities, under trackage agreements. Congress could, if it wished, make a distinction between the two. There was a substantial basis for this. There is no principle which compels it to legislate in respect to both. It is under no legal or logical compulsion to couple with one thing which it believes should be dealt with another and different thing which the Court believes should have been dealt with.

It is only by judicial legislation that a statute can be expanded to embrace something which the Congress never intended to embrace.

B.

The authorities relied upon by the lower Court as supporting the view that the Long Island, in exercising trackage rights over Pennsylvania tracks was operating an extension of its own line, appear in the following excerpt from the opinion of the Court below (R. 570-571):

> "The decisions of the Interstate Commerce Commission first denied and later merely doubted its jurisdiction over such trackage agreements, but for some ten years the decisions have been the other way. In Cleveland, C. C. & St. L. Ry. Co. v. Commerce Commission, 146 N. E. (Ill.) 606, the Supreme Court of Illinois treated a trackage agreement as an 'extension' under Section 1(18). In Cleveland etc. Ry. v. United States, 275 U. S., at p. 409, the Supreme Court sustained the jurisdiction of the Interstate Commerce Commission under another section of the Act stating that 'the order gave no trackage rights' and impliedly agreeing with the Illinois Court on the law but differing as to the facts and the section applicable to the case. In I. C. C. v. Los Angeles, 280 U. S. 52, the Supreme Court seems to have approved an order of the Interstate Commerce Commission for the joint use of terminal facilities. Justice Brandeis, moreover, remarked in Alabama Ry. v. Jackson Ry., 271 P. S., at p. 249, that:
>
> > 'The only limitation set by Transportation Act, 1920, upon the broad powers conferred upon the Commission over the construction, extension and abandonment of the lines of carriers in interstate commerce, is that introduced as paragraph 22 of §1, which excludes from its jurisdiction "spur, industrial, team, switching or side tracks, located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." '"

1. On the face of the opinion, there would appear to be an inconsistency between the statement that "the Supreme Court of Illinois treated a *trackage agreement** as an 'extension' under Section 1(18)" and the statement by the Supreme court of the United States that "the order gave *no trackage rights.*" An examination of the cases cited reveals that in neither of them was a trackage agreement involved. The case before the Illinois Court dealt with the building of a private side track; the case before this Court with the switch connection with this private side track.

2. It is true that the Supreme Court of Illinois voided the order of the State Commission, which approved the building of the private side track, on the ground that this track would be an extension of the railroad within the meaning of paragraphs 18 to 21, and, therefore, that the State had no jurisdiction, because that of the Interstate Commerce Commission was exclusive. It was not true, however, that the Supreme Court of the United States in *Cleveland etc. Ry. v. United States,* 275 U. S. 404, 409, agreed, impliedly or otherwise, with the conclusion that the track would constitute an "extension."

What happened was that the Interstate Commerce Commission ordered the construction, maintenance and operation of the switch connections, under Section 1(9) and that the carrier sought to have this order set aside on the ground that the power of the Commission to deal with side tracks was abrogated by the provision of paragraph 22 that "the authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State." The contention of the carrier, therefore, involved the proposition that the track *was* an "extension" within the meaning of Section 1(18). The denial of this contention involved a ruling that the track was *not* an "extension." This Court denied the contention, saying (275 U. S. 404, 408):

> "Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a

* So designated in the brief of the Interstate Commerce Commission below.

limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier. Compare *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 345; *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U. S. 266; *Alabama & Vicksburg Ry. Co.* v. *Jackson & Eastern Ry. Co.*, 271 U. S. 244, 249. In denying their application to side tracks or spurs, paragraph 22 refers to tracks built by the carrier as a part of its railroad. Compare *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper."

The case did not involve an exercise of trackage rights and anything said in respect thereto is dictum; but so far as the language of the Court has any bearing on the issue in the instant case it is corroborative of our contention that Section 1(18) is limited to tracks *built* by a carrier as part of *its* railroad.

3. The brief of the Interstate Commerce Commission in the Court below laid stress upon the following sentence from the opinion of this Court in the *Cleveland* case (275 U. S. 404, 409): "Furthermore, the order gave the Big Four [the carrier] no trackage rights over the Coal Company's [the shipper's] tracks." Apparently the thought was that, *had* the order given trackage rights, the ruling would have been different—i. e., equivalent to a ruling that the carrier in operating over *these* tracks would have been undertaking an "extension." We submit that this conclusion does not necessarily follow from what the Court said. It may, or may not, be that operation over *private* tracks or over any tracks not already brought into the interstate system would constitute an "extension" of the carrier's own lines, but, even if this were so, it would not follow that the same would be true where the operation was over tracks, already forming part of the interstate system, and, therefore, productive of fuller utilization of that system.

We believe, however, that the thought behind the sentence above quoted was misapprehended. The order there under review was compulsory and not permissive. Any attempt to *require* the carrier to operate into an area for which it had not assumed obligation, by its franchise, would have been unwarranted (*Oregon-Washington R. & Nav. Co.* v. *United States,* 47 Fed. [2nd] 250). With this thought in mind, the remark takes on the character of a prudent and necessary precaution; but in the light of the theory apparently entertained by the Interstate Commerce Commission it would appear as a dictum, since the contention of the carrier, to which it was directed, had already received a satisfactory answer before the Court wrote the sentence beginning with "Furthermore."

4. The case of *I. C. C.* v. *Los Angeles,* 280 U. S. 52, which the Court below says "seems to have approved an order of the Interstate Commerce Commission for the joint use of terminal facilities," arose out of the attempts of the State of California to compel certain carriers to construct a union station in Los Angeles. This would have necessitated the abandonment of certain existing tracks and the construction of certain new tracks. In *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331, it was held that the incidental relocation of these tracks required a certificate from the Interstate Commerce Commission. The City of Los Angeles then asked the Interstate Commerce Commission for an order requiring the three carriers to build a new union station. With this was consolidated an application by the Southern Pacific Company for authority to abandon certain main line tracks and for authority to construct new and to extend existing lines. The Commission held that it had no power to require the construction of a union station. It made a hypothetical certificate to the effect that public convenience and necessity required the extension of lines to reach the union station and permitted the abandonment of certain lines, but denied the application of the Southern Pacific to extend its lines. The City sought mandamus to compel the Commission to consider the question whether it should order the carriers

to build a union station. The Supreme Court of the District of Columbia dismissed the petition. The Court of Appeals reversed the judgment; and this Court reversed the Court of Appeals.

This Court did not approve an order of the Interstate Commerce Commission "for the joint use of terminal facilities." That Commission made no such order. It expressly refused to do so. Trackage rights were not involved in the case.

5. The portion of the opinion in *Alabama Ry* v. *Jackson Ry.*, 271 U. S. 244, 249, invoked by the Court below does not say that the only limitation set by *the Transportation Act* upon the powers conferred upon the Commission is that introduced by paragraph 22 of Section 1. It says that the only limitation upon the broad powers conferred on the Commission *"over the construction, extension and abandonment of the lines of carriers"* is that introduced as Section 1(22). We are confident that this Court did not mean that the Commission possessed over interstate carriers any power it might elect to exercise, except for the one trivial limitation affecting side tracks. Certainly it did not say so.

The *Alabama* case did not involve a trackage right. It dealt solely with a physical connection between two interstate carriers. The remark quoted from that case by the Court below is, we submit, not even a dictum that a trackage right is an "extension" within the meaning of Section 1(18). The Court merely stated what the limitation was on the Commission's power over an "extension," without being called upon, or attempting, to define what an "extension" was. To cite this remark from the *Alabama* case in support of the proposition that a trackage right *does* constitute an "extension" is, we submit, a *petitio principii*.

The reasons given by the Court below for its view that "it is unreasonable to confine them (the words 'extension of its line of railroad' and 'extended line') to cases of the construction, acquisition or maintenance of an extension by an owner" (R. 578) were that the dangers from new construc-

tion and from trackage rights were identical and that courts had already decided that a trackage right was an "extension" within the meaning of Section 1(18). We have shown above that neither of these assumptions has any basis. We submit that, with the failure of support, the view itself falls and that we are brought back to the propositions supported in our Point I, namely, that, by Section 1(18), Congress did not intend to deal with trackage rights, which involve only operating expenses, but intended to control the construction of new lines and extensions and the acquisition of other lines, matters which involve capital charges, increases in the rate base, additional securities, and the creation of superfluous or competing lines.

POINT VIII.

The Court below erred in holding that jurisdiction was properly assumed by the Interstate Commerce Commission, because the Long Island, when running its trains under the proposed trackage agreement, would be preventing an abandonment.

The last of the three separate grounds, on which the Court below sustained the jurisdiction of the Interstate Commerce Commission, had to do with the assumed relation of trackage rights to abandonment. Conclusion of Law 10 was (R. 579):

> "Jurisdiction was properly assumed by the Interstate Commerce Commission because the Long Island, when running its trains under the proposed trackage agreement, * * * (3) would be preventing an abandonment, which might occur, if the railroads agreed to discontinue joint use of terminal facilities because of burdensome rulings by the State authorities."

There was no finding by the Commission or by the Court that the State ever had afflicted either carrier with burdensome rulings; and so we assume that this particular item of aggravation was not regarded by the Court as the basic or exclusive reason why Congress desired to prevent abandon-

ment, and that the statute would equally apply where the carriers agreed to terminate their relationship for *any* reason.

The theory expressed in this conclusion of law does not very clearly appear, but may possibly be somewhat clarified by Conclusion of Law 6 (R. 579):

> "Section 1(18) expressly gives jurisdiction to the Interstate Commerce Commission to prevent abandonment and requires a certificate that 'public convenience and necessity permit' abandonment before it can take place. If the Commission has jurisdiction to prevent abandonment in such a case as this, it has the inevitable power to compel continuance and, as incidental to that power, to determine what sort of an agreement is compatible with the interests of interstate commerce."

The issue here is not disposed of by stating the unquestioned fact that the Interstate Commerce Commission has jurisdiction to prevent abandonment. The real question is what is meant by "abandonment." Generally speaking, it means the surrender by a carrier of its franchise—the definite termination of the thing which confers upon it the right, and imposes upon it the obligation, to operate. Appellees urged upon the Court below that "abandonment," as used in Section 1(18), meant also the discontinuance of operation, under trackage rights, over a line owned by another. The Court below did not rule that this was so. It merely said that, *if* this was so, certain conclusions followed. Although the question was definitely presented to it, it did not hold that abandonment "of a line of railroad" embraced also the mere discontinuance of operation under a trackage right.

There is no ground or justification for revising the language of the Court below so as to make positive something which it preferred to leave conditional—to put in the indicative something which it was careful to place in the subjunctive mode. As the Court did not hold that this case

could present an "abandonment," it follows that the consequences named were merely contingent upon a possibility, and so of no value or importance.

Moreover, the Court below had the best reason for refraining from such ruling. That the words "abandon all or any part *of a line of railroad*" refer to the surrender of its own franchises and not to the mere cessation of operation is shown by the fact that Congress, in order to guard against another possibility, found it necessary to add the words "or the operation thereof." Furthermore, assuming that at least one purpose of Section 1(18) was, as the Court below said, to *prevent* abandonment—that is, to guard against the destruction of portions of the interstate system—it is clear that one purpose of the Act was to prevent parts of the interstate transportation system from being rendered wholly inoperative—a result which would not follow from the withdrawal by *one* carrier from the joint use of the lines of another.

There is another reason why Congress did not deal with such disparite things, as abandonment and the cessation of trackage rights, under the same section. That reason is that an attempt to deal with the latter would have involved a constitutional question: Normally, one carrier cannot secure the right to use the tracks of another, except through an agreement with that other carrier. These carriers have a constitutional right to dissolve their agreement at any time they see fit; and, after such dissolution, an attempt by Congress to compel continuance of operation would be an attempt to compel one carrier to submit to the use of its road by another. Congress recognized this when it made, in Section 3(4), its only attempt to compel the use of one carrier's property by another (in that case, terminal property); for there it provided that the compensation should be on such terms "as the carriers affected may agree to" or on terms fixed by the Commission "on the principle controlling compensation in condemnation proceedings."

It is self-evident that, if the Interstate Commerce Commission has jurisdiction to prevent abandonment, it has power to compel continuance. It has power to prevent aban-

donment of franchises, because a carrier has no right to abandon a portion of them, but must operate *in toto* or abandon *in toto*. But in the case of trackage rights, the case is entirely different. There, the carriers do have a right to terminate their relationship, whereupon the user may cease operating or the owner may oust it from occupation. The Commission has power to compel a carrier to continue use of its franchises, but none to compel the use of another's tracks after the contractual right of use has expired.

The Court below expressly said that the power of the Commission "to determine what sort of an agreement is compatible with the interests of interstate commerce" was incidental to the power to compel continuance. As there is no power to compel continuance of trackage rights, there is, of course, no power to dictate an agreement. Even in the case of an order compelling use of a terminal, the Commission cannot fix such terms as it deems "compatible with the interests of interstate commerce," but must fix the compensation "on the principles controlling compensation in condemnation cases."

If we were to assume, however, that the Interstate Commerce Commission did have power to prevent the discontinuance of trackage rights, to compel continuance, and to dictate the terms of agreement, it would seem to us that such power could not be exercised except in a direct proceeding for discontinuance. The present case arose from no such proceeding. No case of discontinuance was presented. We, therefore, submit that there is nothing in the series of hypotheses that tends in the slightest degree to support the contention that the Commission was called upon to dictate or suggest terms and conditions different from those under which the carriers were already operating.

Indeed, all that we can see in this discussion about abandonment is the light which it throws on the meaning of the words "line of railroad." * It would seem that the "line of

* In *New York Dock Co.* v. *Pennsylvania Railroad Co.*, the Pennsylvania Railroad Company proposed, without leave of the Interstate Commerce Commission, to deliver freight by motor truck from its terminals directly to consignees and to receive freight from consignors for delivery by trucks to its terminals. The Dry Dock Railway sought to enjoin it from so doing,

railroad" which the carrier was forbidden to "abandon" was the same sort of line which it was forbidden to "construct," "extend" or "acquire." As the "line of railroad" which it cannot "abandon" is one owned by itself, it would seem to follow that the "line of railroad" which it cannot "construct," "extend" or "acquire" must also be confined to one owned by it.

POINT IX.

This appeal calls merely for the exercise of judicial functions and not for statecraft.

In an interesting article, "Historical Fragments Pertaining to the United States Supreme Court," appearing in the New York Law Journal of September 28, 1932, Vol. 88, No. 75, the Hon. Martin T. Manton, Senior Judge of the United States Circuit Court of Appeals for the Second Circuit, after pointing out that "the Constitution is what the judges say it is, and the Supreme Court is the highest tribunal," and that "the high importance and great significance of the Supreme Court in the political and economic history of the nation lie in the fact that it has not always been merely a judicial tribunal," says:

> "What was revolutionary, though necessary, in our governmental scheme was the power which the court has exercised in interpreting and formulating the doctrines on which the government is founded. In form the exercise of this power has been by way of

on the theory that this terminal service would be an "extension" of the company's "line of railroad," which could not be undertaken without first obtaining a certificate of public convenience and necessity as provided by Section 1(18). The U. S. District Court for the Eastern District of Pennsylvania denied the application for injunction and dismissed the bill. This was affirmed (January 10, 1933) by the Circuit Court of Appeals, Third Circuit. As reported in The United States Daily, January 20, 1933, at page 4, the Appellate Court said:

> "We hold that the proposed accessorial terminal service by trucks is not a 'railroad,' nor is it a 'line of railroad,' nor 'an extension of a line of railroad,' but it is a service of transportation which may be rendered by the defendant railroad company without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, subject of course to tariffs filed and allowed. The decree of the District Court is affirmed."

> the judicial process of interpretation, but in fact it has been sometimes a process of formulation, of wise and far-sighted judicial legislation, which has overridden the enactments of the legislative department itself."

It may be pointed out that the instant case involves nothing but a question of statutory construction. This Court is not called upon to determine whether, under the Constitution, Congress possesses a certain power claimed to reside in the States, but merely whether, under Section 1(18), Congress intended to, or did, delegate to the Interstate Commerce Commission the power which, in this case, it sought to exercise. Nor is it called upon to decide whether other rights must be subordinated in order that property may flourish. The issue, in short, is not between the Federal Government and the States or between property and other rights, but between the intent of Congress and the will of the Interstate Commerce Commission. We submit, therefore, that this case is not one which requires the exercise of statecraft, but is such as commonly comes before what Judge Manton calls "merely a judicial tribunal."

Before such a body, it is sufficient to refer to the numerous decisions by this Court, some of which are cited in the footnote,* to the effect that where the meaning is clear, there is an end to construction and the statute is to be taken to mean what it says, and that, if the law be deemed to be defective in any respect, the remedy must be applied by Congress and not by the courts. Illustrative of this rule, is *Crooks* v. *Harrelson*, 282 U. S. 55, 60:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape conse-

* *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 85; *Bank* v. *Sherman*, 101 U. S. 403, 406; *Thornley* v. *United States*, 113 U. S. 310, 315; *United States* v. *Union Pacific Railway*, 160 U. S. 1, 35; *White* v. *United States*, 191 U. S. 545, 551; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 295; *American Express Co.* v. *United States*, 212 U. S. 522, 535; *United States* v. *First National Bank*, 234 U. S. 254, 260, 262; *Adams Express Co* v. *Kentucky*, 238 U. S. 190, 199; *Green* v. *Frazier*, 233 U. S. 233, 240; *Chung Fook* v. *White*, 264 U. S. 443, 446.

> quences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester,* 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."

The cases cited make it clear that even though it should appear that it would have been practically or politically desirable, if Congress had given the Commission jurisdiction over the use of existing interstate facilities as well as over the construction and acquisition of additional facilities, still this Court will not attempt to correct the omission itself, through its power of construction, but will leave it for Congress to do so, through its power of legislation. If Congress made any mistake, it may be corrected in the proper way, by supplemental legislation.

In saying this, we do not mean to imply that Congress did make any mistake. There were sound reasons for limiting the section to the construction, acquisition and abandonment of lines of railroad. No crying abuse could result from a more intensive use of existing lines. To have required a certificate for every instance of such use would have tended to discourage it or would have imposed a large volume of unnecessary work on a Commission already overburdened.

The principle involved, while vital to those concerned here, can hardly be of such general application as to necessitate a resort to judicial legislation. There cannot be many other cases where the agreement governing the use of a terminal, begun prior to 1920, has "technically expired." This did happen in the case of the Lehigh Valley, which operates into the same terminal (R. 550, 403); but the Interstate

Commerce Commission has not regarded this as important enough to raise the question under Section 1(20). The principle, although of great importance to the Pennsylvania and to the State and involving far-reaching legal implications, would have little practical importance, except in this one case where the Interstate Commerce Commission has elected to stand upon it.

The aim professed by the Commission is to revise the existing terms, which weaken neither the Pennsylvania nor the Long Island, so as to make them precisely as fair to one party as to the other. It undertook to determine just how much more rental should be paid by the smaller, weaker and controlled Long Island to the larger, stronger and independent Pennsylvania in order to produce this equilibrium of equities. This idealistic aim is beyond the scope of the Commission's jurisdiction. Accordingly, the case is not one of those where this Court is obliged to accept as unerring, or, at least, as conclusive, the judgment of the Commission; and there is reason to believe that, in this case, the Commission has not achieved the nice adjustment of equities which it was ambitious to secure. The case, we submit, does not present one of the occasions where the Court invokes its extra-judicial activities.

There is abundant reason to believe that, for legal reasons, the practical effect of upholding this certificate with the condition attached would be far from desirable. The aim of this proceeding is to free the Pennsylvania from the control over the rental now possessed by the State. The Interstate Commerce Commission presumably believed that, by following this practice, control by it would be substituted for control by the State. This, however, is exceedingly doubtful. It involves the assumption that, after making the agreement required as a condition to the issuance of the certificate, the parties will be unable to modify its terms, without the approval of the Commission. It is hard to see how the Commission can thus restrict the right of the parties to contract with each other. Such power is not conferred by statute and cannot be acquired through stipulation of the parties. It is probable that the parties could enjoy the certificate,

while rejecting the condition as unlawful (see *United States* v. *Chicago etc. R. Co.,* 282 U. S. 311, 327, 328, 342). Probably the only effect would be to free the Pennsylvania from *all* control.

Moral factors, so far as they may be inducements to judicial legislation, seem to be lacking. The purpose of the Pennsylvania in seeking to abolish all control over the rental is apparent. As it owns practically all the stock of the Long Island (R. 573), it would gain nothing merely by increasing the rental paid by the Long Island; for as the rental increased, the dividends would *pro tanto* decrease, leaving the total amount received the same as before. An increase in the Long Island rental would, however, increase the operating expenses of the latter and so afford a ground for claiming an increase in the intrastate rates charged by the Long Island. That this is the program of the Pennsylvania is obvious and is proved by the fact that when, in 1923, approval of the increased rental was sought from the Transit Commission, it was deemed necessary, at the same time, to seek for an increase in commutation rates, in order to meet this increase in the rental (R. 342, 574).

Unless the bare possibility of "burdensome rulings" by the State be a reason, there is, we conceive, no other requiring the exercise by a court of other than its purely judicial functions. Every time but one that agreements were submitted to the State authorities they were approved by them. After the approval of agreements in 1912, 1920 and 1922, the rental paid by the Long Island increased from $519,173 in 1911, to $1,660,165 in 1922, and to $1,812,024 in 1923 (R. 574). The application which was not granted was made in 1923. This was not refused absolutely, but was afterwards granted in modified form and was made retroactive to July 1, 1923 (R. 342). Following this, the rental increased from $1,812,024 in 1923, to $2,835,151 in 1928 (R. 577). When application was made to the Interstate Commerce Commission, seeking approval of the maximum rental that had been sought from the Transit Commission in 1923 and in 1925, the Interstate Commerce Commission refused to approve it

(just as the Transit Commission had done), on the ground that it "imposes unreasonable terms upon the Long Island" (R. 355).

The Pennsylvania terminal was constructed to meet the needs and resources of a great interstate trunk line system of 12,000 miles. The maintenance charges, taxes and interest on the investment would be borne entirely by the Pennsylvania, if it did not secure something from the trackage rights granted to other companies. What it receives from the Lehigh Valley and from the New York, New Haven and Hartford does not appear in the printed record. For the partial use of the part used by the Long Island east of Tenth Avenue, Manhattan, it receives substantial sums. The Long Island pays a proportion of the operating expenses, taxes and interest on the investment on each of the three zones into which all the property east of Tenth Avenue, except the station building above the track level, is divided. In 1930, the Long Island paid the following percentages of operating expenses, taxes and interest (R. 575):

Zone	*Percentage*	*Investment*
1	42.08	$46,896,745.94
2	60.49	32,605,521.38
3	7.65	8,625,170.90

It thus appears that the Long Island, a system of about 400 miles, pays very large percentages (which will be increased) of the expenses, taxes and carrying charges on facilities designed for the Pennsylvania, a system of 12,000 miles. This is due to the wheelage basis—a method which bases the rental on the number of car movements. As the Long Island is engaged in suburban traffic, its car movements are much more numerous and rapid than those of the Pennsylvania, which has practically no suburban business in this station, since it diverts this traffic to the downtown station of the Hudson & Manhattan (R. 346, 440). Consequently, the Long Island makes more intensive use of the tracks and moves more cars than the Pennsylvania within the same period.

There is a material difference between the dense suburban traffic of the Long Island, which makes for low unit costs, and the trunk-line traffic of the Pennsylvania, with heavy and comparatively infrequent trains and no surburban service (R. 353). The tendency of the wheelage basis is to transfer this benefit of low unit costs due to this density of operation from the Long Island to the Pennsylvania. The Transit Commission approved the wheelage basis only because the injustice of it was mitigated by omitting all interest, taxes and operating charges in connection with the station building, and further by computing interest at 4 and 4½ per cent. (the amounts originally chosen by the parties themselves) on the investments in the other facilities (R. 349). The Interstate Commerce Commission approved an increase in the rental, by adhering to the wheelage basis and at the same time increasing the interest rate to 5 per cent. (a rate higher than that paid by the Pennsylvania to its lessor) and by requiring the Long Island to pay 20 per cent. of the operating expenses of the station building.

It is not without a sense of our limitations that we have undertaken to consider and discuss the possibilities so clearly expressed by the Senior Judge of the Circuit from which this case comes. Principles of law and the rules of construction lie open to lawyers in the books; but the nature of the law-giving process that goes on above the cloud-line of Sinai must necessarily be a matter of inference and speculation to those who are not initiates. We have, however, grappled with these esoteric aspects as best we might, and have endeavored to show that this case presents merely a question of statutory construction and that there are no circumstances which call for more than the application of the rules of construction which are referred to in our earlier Points.

POINT X.

The decree of the Court below should be reversed and the certificate or order of the Interstate Commerce Commission, adopted February 8, 1932, should be set aside and annulled.

Dated, New York, January 25, 1933.

Respectfully submitted,

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